



*Juris prudentium eloquentissimus  
et eloquentium Juris prudentissimus*





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et eloquentium Iuris prudentissimus*

AN  
ABRIDGEMENT  
OF  
The Lord COKE'S  
COMMENTARY  
ON LITTLETON:

Collected by an unknown Author; yet  
by a late Edition pretended to be  
*Sir Humphrey Davenports Kt.*

AND  
In this Second Impression purged from  
very many gross ERRORS committed  
in the said former Edition.

With a TABLE of the most remarkable  
things therein.

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L O N D O N:

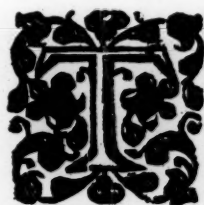
Printed for *W. Lee, D. Pakeman, and*  
*G. Bedell.* 1651.





## TO the READER.

Courteous Reader ;



*His little Book was lately sent abroad with many grosse Errours, as an Abridgement of the Lord Cokes Comment on Littleton, under the Name of S<sup>r</sup> Humphrey Davenport K<sup>t</sup> (long since deceased) though indeed many very materiall things in the Lord Cokes Comment is not in the late Edition or Abridgement at all hinted or mentioned. If thou art curious to understand the Law, bee pleased to consult the large Volume (which is an exact learned Work, and curiously corrected, and approved by all learned in the Common Laws) but if thy leasure (for the present) will not permit thee to read that learned Work at large, know that thou mayest, for Twelve-pence, have*

*this*

TO the READER.

*this Compendium, and be welcome to the carefull  
Publishers hereof, who desire thy benefit and the  
publike good.*

From our Shops in  
*Fleetstreet, Nov. 24.*

1651.

*Munday.*

W. Lee.

D. Pakeman.

G. Bedell.

11  
e



The true portraiture of Iudg Littleton the famous  
English Lawyer



## C A P. I.

*De Feodo Simplici.*

*Feodum simplex idem est quod hereditas legitima, vel pura. Tenant in fee simp. 1. He hath the estate in the land. 2. He holdeth the land of some superior Lord. 3. He is to perform the services due, and 4. He is thereunto bounden. 5. By Doom and judgement. Pradium*

*domini regis est directum dominium, cujus nullus Author est nisi Deus. Subiectus habet utile dominium. Bract. l. i. c. 8,*

*Fee ex feif (i) pradium beneficiarum. Fee divided into 3 parts, viz. simple or absolute, conditional, qualified, or base. Bract. 262. & 207. Pl. Com. Walsing c. Di. 252, 253. Fee signifies that the land belongs to us and our heirs, and in this sense the King is said to be seised in fee. It is also taken, as it is holden of another by service, and that only belongeth to the subject. Brit. 205. 207. Item dicitur feodum alio modo ejus qui alium ffoffat, & quod quis tenet ab alio, ut sit qui dicat, talis tenet de me tot feoda per servitium militare, and Fleta saith, poterit unus tenere in feodo quoad servitia, sicut dominus Capitallis, & non in dominico; alius in feodo, & dominico, & non in servitio, sicut libere tenens alicujus; and therefore if a stranger claim a Seigniorie, and distrain, and a vow for the service,*

B

the



## Of Fee Simple:

the Tenant may plead, that the Tenancy is *extra feodum*, &c. Of him (that is) out of the surrendry, or not holden of him that claimeth it, but he cannot plead *hors de son fee*, unlesse he take the Tenancy, that is, the State of the land upon him. 2 Aff.p.4. 12 Aff.38. 12 E.3. tit. *hors de son fee* 28. (i.b.) *ignoratis terminis, ignoratur & ars. Si un annuitie soit grant al home & à ses heirs ceo est fee simple personal.*

*Simplex idem est quod purum, & purum dicitur, quod est merum & solum sine additione. Simplex donatio & pura est, ubi nulla addita est conditio sive modus simplex enim datur quod nullo additamento datur, every fee is not legitimate; for a disseisor, abator, intruder, usurper, &c. hath a fee, but not a lawful fee, fo.2.a.*

*Si un alien purchase très, &c. Le roy sur office tröve eux aura, home attaint de felony, nad capacity de purchaser, sinon pur le benefit del roy, Dier 283. An Alien Merchant whose King is in league with ours, may take a lease for years of a house for habitation, as incident to commercery, and as necessary to his trade and traffique, but not for the benefit of his Executors or Administrators; for if he die possessed of the lease, or relinquish the Realm, the King shall have it, 5 Mar. Br. tit. denizen 22.*

If a man commit felony, and after purchase lands, and is attaint, the Lord of the fee, shall have the Escheat, 49 Aff. p:2. 49 E.3. 11.

If any sole corporation, or aggregate of many, *religiosus vel alius*, ecclesiastical or temporal; purchase Lands in fee, without licence, they cannot retain, for if the mesn Lords make default, and do not enter, &c. the King shall have the Lands, &c. 7 E.1. De Relig. per alienation in Mortmain les Seignors perdont leur escheats, and in effect the service de chivaler per defence del roialm, ward, marriage, relief, &c. Et pur ceo fut dit mortmain quod rend. nul. service.

Stat. delig. 7 E. 1. per quod quæ servitia ex huiusmodi feodis debentur, & quæ ad defensionem regni ob initio provisa fuerunt, indebite subtrahuntur, & capitales domini eschaet. suas amittunt. M. Ch.c.36. *Prelatus ecclesia sua conditionem meliorare potest,*

*post, deteriorare nequit. Est enim eccle, ejusdem conditionis, quæ fungitur vice minoris. Sed nullum simile quatuor pedibus currit.* (2. b.) *Brac. l. 2. f. 12. & 32 Si feme covert purchase Lands, &c. Le baron peut disageer & devest tout lestate ; but albeit her husband agreed thereunto, after his death she may waive the same, and so may her heires also, if she her selfe agreed not, &c. After the decease of her husband. The Queen is an exempt person (by the common law) from the King, and may purchase and grant, &c. Uxor is a good name of purchase, without a Christen name, and so it is, if a Christen name be added and mistaken. Utile enim per inutile non vitiatur, 1. H. 5. 8. Purchases are good in many cases by a known name, or by a certain description of the person without either surname, or name of Baptisme, as uxore I S or primogenite filio I S. or vest. hered. I. S. But regularly in writs the demandant or plaintiff is to be named by his Christen name & surname, unlesse it be the case of some corporations, or bodis politique (3. a.) 8. E. 3. 437. qui ex damnato coitu nascuntur inter liberos non computantur. Bastardus est quasi nullius filius. A man makes a Lease for life to B. the remainder to the eldest issue male to be begotten of the body of Jane S. whether the same issue be legitimate or illegitimate B. hath issue a bastard on the body of I. S. this Son or issue shall not take the remainder, because in Law he is not his issue. M. 38. & 39. el. in bre. de err.*

A Bastard may purchase by his reputed name to him and his heires, although he can have no heire but of his body, 39. E. 3. 11. 24. 17. E. 3. 42. 35. Af. 13. 41. E. 3. 19 / An office which concernes the benefit or safety of the commonwealth, &c. granted to a man which is unexpert, and hath no skill or science to exercise or execute the same the grant is merely void, and the party disabled by law, to take the same, *pro commodo regi & populi.* Dier 150:

An infant or minor is not capable of an office of Stewardship of the Court of a Mannor either in possession or reversion. No man though never so skilful &c. Is capable of a judiciall office in reversion, but must expect untill it fall in

319 Possession, *l. 11. 2. Sect. 378.* The King is capable of an office, not to use, but to grant. A purchase is, &c. when one cometh to lands by conveyance or title; and not by tort, as by disseisin, &c. Note that purchasers of lands, tenants, leases, and hereditaments, for good and valuable consideration, shall avoid all former fraudulent and conveyance, estates, grants, charges, and limit of uses, of or out of the same. Stat. 27 *El. cap. 4.* (3.b.) 13 *El. c. 5. l. 3. 80. Twines c.* States of inheritances of lands, are either certain or unmoveable, whereof *Littl.* here speaketh; or uncertain and moveable, as if partition be made between two Co-partners of one and the self same land, that the one shall have it the first year, and the other the second year *alternis vicibus*, &c. (4. 2.) *l. 1. 87. F.N. B. 62.* Between *pastura* & *pascuum* the legal difference is this, that *pastura* in one signification containeth the ground it selfe called pasture, and by that name is to be demanded. *Pascuum* is wheresoever cattel are fed, of what nature soever the ground is, and cannot be demanded in a *præcipe* by that name, (4.b.) many things may pass by a name, that by the same name cannot be demanded by a *præcipe*, for that doth require a more perscript form) but whatsoever may be demanded by a *præcipe*, may pass by the same name by way of grant, *Ibid.* (3.b.) If the feoffor be bound to warranty, and so to render in value, then is the defence of the title at his peril, and therefore the Feoffee in that case shall have no deeds that comprehend warranty, whereof the Feoffor may take advantage. Also he shall have such charters as may serve him to deraign the warranty paramount; but other evidences which concern the possession, and not the title of the land, the Feoffee shall have them. (6.a.) *l. 1. 1. & 2.* There have been eight formal or orderly parts of a deed of feoffment, *viz.* 1. The premises. 2. *Habendum.* 3. *Tenendum.* 4. *Reddend.* 5. The clause of warrant. 6. The *in cuius rei testimonium sigillum*, &c. 7. The date. 8. The clause of *his testibus*.

The office of the premise of the deed is twofold, 1. Rightly to name the feoffor and the feoffee; and 2. to comprehend

hend the certainty of the lands to be conveyed, &c. Either by exprefs words, or which may by reference be reduced to a certainty, for *certum est quod cert. reddi potest, &c. Vide libr.* The Seal is of the essential part of the deed. The date many times antiquity omitted, for that the limitation of prescript or time of memory did often in proceſſe of time change, and the law was then holden that a deed bearing date before the limited time of prescript, was not pleadable; and therefore they made their deeds without date, to the end they might alledge them within the time of prescription. The date was commonly added in the Reign of Ed. 2. & 3. (6.a.) *que sunt minoris culpe sunt majoris infamie.* Reg. he that loseth *liberam legem*, becometh infamous, and can be no witness: As if a Champion in a writ of right become recreant or coward. But oftentimes a man may be challenged to be of a Jury, that cannot be challenged to be a witness, and therefore though the witness be of the nearest alliance or kinred, or of counsel, or tenant, or servant to either party, (or any other exception that maketh him not infamous, or to want understanding, or discretion, or a party in interest) though it be proved true, shall not exclude the witness to be sworn. 22 Afs. 12.41. If a witness be outlawed in a personal act, hee cannot be joynd to the Jury; but yet that is no exception against him to exclude him to be sworn as a witness to the Jury; for that he with others should join in verdict with the Jury in affirmance of the deed, the party should be barred of his attainr, because there is more then twelve, that affirm the verdict. But note, there must be more then one witness, that shall be joynd to the enquest, *Inff.* 6.b.

*Max.* Witnesses cannot testify a negative, but an affirmative; when a trial is by witnesses, the affirmative ought to be proved by two or three witnesses, as to prove a summons of the Tenant, or the challenge of a Juror, &c. But when the trial is by verdict of 12 men, there judgement is not given upon witnesses, &c. but upon the verdict, &c.

Probatio duplex	{	viva, sc. per testes	{	presumptio triplex.	{	1. Violenta.
		mortua par chartas, &c.				2. Probabilis.
						3. Levis seu temeraria.

Many time Juries together with other matters, are much induced by presumptions. In case of a Charter of feoffment if all the witnesses be dead, &c. Then violent presumption which stands for a proof, is continual and quiet possession: for, *ex diuturnitate temporis omnia præsumuntur solenniter esse acta*. Also the deed may receive credit *per collationem sigillorum scripturæ, &c.* Glan. l. 10. c. 12.

A wife cannot be produced either against, or for her husband, *quia sunt duæ animæ in carne una*. In some cases women are by law wholly excluded to bear testimony, as to prove a man to be a Villain. *Mulieres ad probationem Status hominis admitti non debent.* Fleta l. 2. c. 44.

In an information upon the statute of usury, the party to the usurious contract, shall not be admitted to be a witness against the usurer, for in effect he should be *testis in propria causa*, and should avoid his own bonds, &c. *Smiths case T. 8. f. in C. B. & Brit. 134.* He that challengeth a right in the thing in demand, cannot be a witness; for that he is a party in interest. *Britton fol. 134. (6. b.)*

*Tenementum*, is a large word not only to passe lands and other inheritances which are holden, but also offices, rents, commons, profits apprehender out of lands, &c. wherein a man hath any franktenement, and whereof he is seised ut 14: 8. *de libro tenemento*. But *hereditamentum*, is the largest word of all in that kind, for whatsoever may be inherited, is an *hereditamentum*, be it corporeal or incorporeal, real, or personal, or mixt.

(6. a.) If a man by deed give lands to another, and to his heirs, without more saying, this is good, (*ut res magis valeat quam pereat*) if he put his seal to the deed, deliver it, and make livery accordingly. So it is if A give lands, to have and to hold to B and his heirs, this is good by construction

struction of the Law: but when form and substance concur, then is the deed fair and absolutely good. (fol. 7. a.) In ancient charters, &c. there was never mention made of the delivery of the deed, or any livery of seisin indorsed: for the witnesses named in the deed, were witnesses of both, *ib.*

Witnesses are very necessary, for the better strengthening of deeds, fol. 7. b.

*Hæres legitimus est quem nuptiæ demonstrant*, and is he to whom Lands, Tenements, and Hereditaments, by the act of God, & right of blood, do descend of some estate of inheritance, for *Solus Deus facere potest heredem non homo; hæres ab hærendo, nam qui hæres est, hæret, vel dicitur ab hærendo quia hereditas sibi hæret, &c. Vide libr. Partus* cui natura aliquantulum ampliaverit vel diminuerit, non tamen superabundanter, bene debet inter liberos connumerari. Si inutilia nostra reddidit, ut si membra tortuosa habuerit, non tamen *is partus monstrosus*. *Bract. l. 5. f. 437.*

A denizen by the Kings Letters Patents, cannot be heir, 298. &c. But otherwise is it, if he be naturaliz'd by Act of Parliament: and if one be made denizen, the issue that he hath afterwards shall be heir to him. An alien cannot be heir, &c. *Propter defectum subjectionis*. Fol. 8. a.

Where the Sons by no possibility can be heir to the Father, the one of them shall not be heir to the other; as if an alien cometh into England, and hath issue, &c. l. 7. *Calvins Case*.

A man attainted of Treason or Felony can be heir to no man, nor any man heir to him, *propter delictum*. A man hath issue two sons, and after is attainted, &c. And one of the sons purchase Lands, and dieth without issue, the other brother shall be his heir, for the attainder, &c. corrupteth the lineal blood only, & not the collateral blood between the brethren, which was vested in them before the attainder. But if a man after he be attainted have issue, &c. *Autrement est*. In case, where *filiatio non potest probari*, the child may choose his Father.

A man by the common law, cannot be heir to Goods or Chattels, for *hæres dicitur ab hereditate*. *Hæres astrarius*: so called

called *ab aſtre*, i.e. an harth of an houſe; *cum Antecellor reſtituat hæredi in vita ſua hæreditatem*, &c. fol. 8. b.

*Si uxor dicit ſe eſſe prægnantem de ipſo defuncto cum non ſit, habeat hæres breuium de ventre inſpic. nemo eſt hæres viventis; apparens dicitur.*

If a man give land unto two, & *hæredibus*, omitting *ſuis*, they have but an eſtate for life, for the uncertainty. 10 H. 6. 7. *Pl. Com.* 28. b.

*Ceux parolx (ſes heirs) tantſolement font leſtate denheritance en tous reſſointments and grants.*

Here Littleton treateth of purchaſes by natural perſons, and not of bodies politique or corporate.

As the heir doth inherit to the anceſtor, ſo the ſucceſſor doth ſucceed to the predeceſſor, and the executor to the Teſtat.

104. An ancient grant muſt be expounded as the law was taken at the time of the grant. 17 E. 3. 25. b.

*Sub vocabulis (hæredibus ſuis) ſomnes hæredes propinqui comprehenduntur, & remoti, nati, & naſcitur.* fo. 9 a. *Fleta l. 3 c. 8.*

The law is preſiſe in preſcribing certain words to create an eſtate of inheritance, for avoiding of uncertainty, the mother of contention and conſuſion. *Pl. Com.* 163.

There bee many words ſo appropriated, as that they cannot be legally expreſſed by any other words, &c. ſome to eſtates of lands; ſome to tenures; ſome to perſons; ſome to offences; ſome to forms of Originall Writs; ſome to warrant. &c.

*Satus dicitur à ſtando.* An eſtate of inheritance granted by the great Seal, &c. is deſcendible according to the courſe of the common law.

6. *Hæreditas eſt duplex.* { *Corporata, viz.* Of Lands and Tenements, which may paſſe by Livery, by Deed, or without Deed.  
*Incorporata*, as Advowſons, Commons, &c. which cannot paſſe by livery, but by Deed.

The Deed of incorporate inheritances doth equal the livery of corporeate.



al I. S. habend. sibi & succes. sine hered. suis & fee s. Si soit per Letters Patents.

A conveyance by feoffment cleareth all disseisins, abatements, intrusions, and other wrongful or defeasible estates, where the entry of the feoffor is lawful, which neither fine, recovery, nor bargain and sale by deed indented and inrolled doth. Sometime, when an estate of freehold only doth pass, improperly it is called a feoffment.

*Done est nosine general plus que nest feoffment, car done est general à tous choses moebles & nient moebles, Feoffment est riens forsque del soil.*

If a man devise lands to a man in perpetuum, or to give, and to sell &c. A fee simple doth pass by the intent of the devisor. *Fol. 9. b.*

A man deviseth land to one & sanguini suo, that is, a fee simple, but if it be semini suo, it is an estate tail. *Br. tit tail 21.*

So that, *ceux parolx (ses heirs tantseulement, &c.* Extend not  
1. To last Wills, and Testaments. 2. Not to a fine, *sur confians de droit come ceo, &c.* 3. Nor to certain releases. 4. Nor to a recovery. 5. Nor to a creation of Nobility by Writ. 14.

But out of This rule of our Author, the Law doth make divers exceptions; as, 1. If the Son infeoff the Father, as fully as the Father infeoffed him. 2. In respect of the consideration, as if lands be given in frankmarriage generally. 3. If a feoffment or grant be made to any corporation aggregate of many persons capable. 4. In case of a sole corporation, as if a feoffment in fee be made to a Bishop, *habendum, &c. In libera elemosina.* 5. In grants sometimes, as if one coparcenor for owelty of partition grant a rent to the other generally, &c. *Ipsa etenim leges cupiunt ut jure regantur.* 6. By the Forrest Law, if an Assart be granted by the King to another *habendum & tenend. sibi in perpetuum*, he hath a fee simple without this word (heirs) *fol. 10. a.*

And this rule, &c. extendeth to the passing of estates of inheritances, in exchanges, releases, or confirmations that enure by way of enlargement of estates, warranty, bargains and



and sales by Deed indented and inrolled, &c. In which, this word (heirs) is also necessary, for they do ~~take~~ amount, to a Feoffment or grant, & *ubi eadem ratio, ibi idem jus.*

15. A man may purchase lands to him and his heirs, 1. By Feoffment. 2. By Grant. 3. By Fine which is a Feoffment of Record. 4. By common recovery, in nature of a Feoffment of recovery. 5. By Exchange. 6. By Release to a particular Tenant. 7. By confirmation, &c. which are in nature of Grants, &c. 9. By bargain and sale by Deed, &c. Ordained by Statute. 10. By devise, by custome of some particular place, and by Will in Writing, generally by authority of Parliament. 27 H.8. ca. 16. 32 H.8. ca. 2. 34 H.8. cap. 5.

If a disseisin, abatement, or intrusion be made to the use of another; if *cessy que use* agreeth thereunto in pays, by this bare agreement he gaineth a Fee Simple without any livery of seisin, &c.

#### Se<sup>ct</sup>. 2.

*Linea recta semper praefertur transversali. Proximus excludit propinquum, & propinquus remotum, & remotus remotiorem, fol. 10. b.*

Proximum Sumitur duplici sc.	{	<i>Jure propinquitatis</i> , and he that is, thus next,
		&c. is mediately inheritable.
{	<i>Jure representationis</i> , and so one is immediately	
	inheritable, and accounted in Law next of blood.	

A Lease for life is made to A. the remainder to his next of blood, in this case, he that is next of blood, and capable by purchase, shall have the remainder, though he be not legally next to take as heir by descent; note the diversity.

#### Se<sup>ct</sup>. 3.

*Maxime* so called, *quia maxima est ejus dignitas & certissima auctoritas, atque quod maxime omnibus probetur.* Pl. com. 27:

Lineal ascent is prohibited by the law, but not Collateral, &c. fo. 11. a.

## Of Fee Simple.

11

Littletons proofs and arguments drawn from the common law, are first, from the maxims, rules, intendment and reason of the common law. 2. *Ab autoritate & pronūciatis.* 3. *A rescriptis valet argumentum.* 4. From the form of good pleading. 5. From the right entry of judgments. 6. *A præcedentibus approbatis & usu.* 7. *A non usu.* 8. *Ab artificialibus argumentis consequentibus & conclusionibus.* 9. *A communi opinione jurisprudentium.* 10. *Ab inconvenienti.* 11. *A divisione, vel ab enumeratione partium.* 12. *A Majore ad minus, & à minore ad majus, à simili, à pari.* 13. *Ab impossibili.* 14. *A fine.* 15. *Ab utili, vel inutili.* 16. *Ex absurdo.* 17. *A natura & ordine naturæ.* 18. *Ab ordine religionis.* 19. *A communi præsumptione.* 20. *A lectionibus jurisprudentium.*

From Statutes his Arguments and proofs are drawn. 1. From the rehearſal or preamble of the Statute. 2. By the body of the law diversly interpreted, sometimes by other parts of the same statute, which is *benedicta expositio, & ex visceribus causæ*; Sometime, by reason of the common Law.

But ever the general words are to be intended of a law-ful act, and such interpretation must ever be made of all statutes, that the innocent may not be damnified, &c. fol. 11.b.

There be divers laws in England: As first, *lex Coronæ.* 2. *Lex & consuetudo Parliamenti.* 3. *Lex naturæ.* 4. *Lex communis Angliæ.* 5. Statute Law. 6. *Consuetudines.* 7. *Jus belli, in republica maxime conservanda sunt jura belli.* 8. Ecclesiastical, or Canon Law in Courts in certain cases. 9. Civil Law in certain cases, only in Courts Ecclesiastical, but in the Courts of the Constable, and Marshal, and of the Admiralty. 10. *Lex Forestæ.* 11. The Law of Marque or Reprisal. 12. *Lex Mercatoria.* 13. The Laws and Customs of the Isles of Jersey, Gernsey, and Man. 14. The Law and privilege of the Stannery. 15. The Laws of the East, West, and middle Marches, which are now abrogated.

A man that claimeth as heir in fee simple to any man by discent, must make himself heir to him that was last seised of the actual freehold, and inheritance; where the unckle can-

cannot get an actual possession by entry, or otherwise, there the Father cannot inherit, &c.

Warranties shall descend to him that is heir at the common law. *Fol. 12. a.*

369. And a warranty shall not go with Tenements, whereunto it is annexed, to any special heir, but to the heir at the common law.

*Señ. 4.*

None shall inherit any lands as heir, but only the bloud of the first purchaser. *Plow. 447. refert à quo fiat perquisitum. Fleta l. 6. c. 1. 2. Bract. l. 2. fo. 65. 67.*

*Multa transeunt cū vēritate, quæ per se non transeunt (vid. lib. fo. 12. b. 5 E. 2. Avowry 207.* Whensoever lands do descend from the part of the Mother, the heirs of the part of the Father shall never inherit, & è converso, 39 E. 3. 29. *fol. 13. a.*

*Escheat i. e. cadere, excidere, vel accidere, quod accidit duobus modis, aut perfectū sanguinis; aut per delictū tenentis, atque illud est.*

*Per iudicium* { aut quia suspensus per collū.  
*lib. 1. c. 1. 2.* { aut quia abjuravit regnū.  
*modis.* { aut quia utlegatus.

316. In an appeal of death, &c. hanging the Process, the defendant conveyeth away the land, & after is outlawed, the conveiance is good, & shall defeat the Lord of his escheat; but otherwise is it if a man be indicted of felony, &c. for in the case of Appeal the Writ containeth no time when the felony was done, and therefore an escheat can relate but to the outlawry pronounced; but the indictment containeth the Time when the Felony was committed, and therefore the escheat upon the outlawry shall relate to that time.

If lands holden of I. S. be given to a Dean and Chapter, Major and Commonalty, and to Their successors, &c. And after such body politic or incorporat is dissolved, the donor shall have again the Land; (for that the cause of the gift

gift or grant failerth:) and not the Lord by Escheat. (But no such condition is annexed to the estate in fee simple vested in any man in his natural capacity, but in case where the donor or feoffor reserveth to him a tenure, and then the law doth imply a condition in law by way of escheat, fol. 13.b.

*Sett. 5.*

Descent is a means whereby one doth derive him title to certain lands, as heir to some of his Ancestors. *Quod prius est, dignius est, & qui prior est tempore, potior est jure.* 248. 171.

*Sett. 6.*

*Nul aña trē. de fee simp. per descent come heir, &c. Si non que il soit heir dentier sanke.*

The half blood, is no blood inheritable by descent, being not compleat and perfect. Fol. 14.a.

*Sett. 8.*

Lands, &c. shall descend to him that can make himself heir to him that was last actually seised of the Freehold of the land, &c. Fol. 15.a.

Whether the seisin of a rent reserv'd upon a lease for life be such an actual seisin of the land in the eldest son, as the sister in a writ of right may make her self heir of this land to her brother; admitting there be son and daughter by one venter, and a son by another venter. *Vid. lib. Qu. 7 H. 5. 34. per Hals & Lodington. \* 35 Ass. p. 2.*

When an entry shall vest or devert an estate, there must be several entries into several parcels of land, &c. but wher the possession is in no man, but the freehold in law is in the heir that entreth, there the general entry into one part reduceth all into his actual possession. Fol. 15.b. 271.

*Possessio fratris de feodo simplici facit sororem esse heredem. 11 H. 4. 11. l. 3. Ratcliffs case.*

All the lands and possessions whereof the King is seised in *Jure Corona*, shall *secundum jus Corona*, attend upon and follow the Crown.

The quality of the person doth alter the descent.

*Sett. 9.*

Señ. 9.

6. Inheritance is not only intended, where a man hath Lands, &c. By descent of inheritance, but also by purchase. Fol. 16. a. 7. H. 4. 5. \* 6. E. 3. 30.

9. A man may have inheritance in title of Nobility, by creation, by descent, and by prescription. By Creation, by Writ and by Letters Patents. If he be called by Writ to the Parliament, he hath a Fee Simple in the dignity, &c. Without any words of inheritance; but if he be created by Letters Patents, the state of inheritance must be limited by any words, or else the grant is void. The creation by Writ is the ancients, by Letters Patents the surer; for he may be sufficiently created by Letters Patents, and made noble, albeit he never sit in Parliament.

*Simuliter nobilis nupserit ignobili de finit esse nobilis*; that is if she gain her Nobility by marriage. But if a woman be noble by descent, &c. It is otherwise. Fol. 16. b. l. 4. 118. *Adon Case*.

*Litleton* citeth no Authority, but when the Case is rare, or may seem doubtfull; *Prespectua vera non sunt probanda*. *Vi de Librú*, &c.

Señ. 10.

*Placitum, á placendo, quia bene placitare super, omnes placet*. Fol. 17. 2.

Seised, is properly applied to Freehold, possessed, Goods and Chattells. *Bract. lib. 4. f. 263.*

Demain, of the hand, i.e. manured by the hand, or received by the hand.

*Seisitus*. &c. in dominico suo ut de feodo, sc. de res, &c. *De quâ* home peut aver un manuel occupation, &c. *Seisitus* ut de feodo sc. de *Advowson* &c.

*Ut de feodo*, is to be understood positively; where (ut) *denotat ipsam veritatem*, & non similitudinem rei. / *Idonea persona* for the discharge of the Cure should be presented freely, &c. By the Patron, Guardian in Socage shall not present to an Advowson because by the Law he can meddle with nothing that he cannot account for. Fol. 17. b.

Advo-

## Of Fee Simple.

15

*Advocatio*, is an advowing or taking into protection; & est *jus patronatus*. 7 E.3.4. 45 E.3.5.

Two coparceners, one of them shall have a writ of right of Advowson *de medietate advocacionis*; for in truth she hath but a right to a moiety: but where there be two Patrons, and two Incumbents in one Church, each of them shall have a Writ of Advowson *de advocacione medietatis*. 126.

Two fee simples absolute cannot be of one and the self-same land, fo. 18.a.

### Se<sup>ct</sup>. II.

And yet the several persons by Act in law, a reversion may be in fee simple in one, and a fee simple determinable in another by matter *ex post facto*; as if a gift in tail be made to a Villain, and the Lord enter, the Lord hath a fee simple qualified, and the donor a reversion in fee; but if the Lord infeoff the donor, now both fee simple are united, and he hath but one fee simple in him: but one fee simple cannot depend upon another by the grant of the party: as if lands be given to A, so long as B hath heirs of his body, the remainder over in fee, the remainder is void.

### Se<sup>ct</sup>. 12,

A purchase is always intended by title, and most properly by some kind of conveyance for money or some other consideration, or freely of gift. 10: 18: 19.

An heir-loom, is called *principalium* or *hereditarium*. Si un monument soit deface in lesglise, le heir del Ancestor peir a-ver son action, &c. 9 E.4. 24.

## C A P. II. De Fee Tail:

### Se<sup>ct</sup>. 13.

**T**ailum, derived of tailler scindere. Modus & conventio vincont legem. Fol. 19.a.

Before the statute of West. 2. De donis conditionalibus, the heir

heir in Tail had no Fee simple absolute at the common law, though there were divers descents. Annuities and such like inheritances as cannot be intailed within the said Statute, remain at the common law.

If the King before the statute, &c. had made a gift in tail, &c. in this case, if the Donee had no issue, and before the statute had aliened with warranty, and died, and the warranty had descended upon the King, this should not have bound the King of his reversion without assents: but otherwise it was in the case of a common person, fol. 19. b. 6 E. 3. 56. 45 Aff. p. 6. The King can do no wrong, Pl. c. 246.

Self. 14, 15.

Not only all corporate inheritances which are or may be holden, but also all inheritances issuing out of any of those inheritances, or concerning or annexed to, or exercisable within the same though they lie not in tenure, may be intailed. As Rents, Estovers, Commons, &c. Or Uses, Offices, Dignities which concern lands, or certain places, &c. But if the grant be of an inheritance meer personal, or to be exercised about chattels, and is not issuing out of land, &c. As the grant of an annuity of the office to be faulconer, master of horse, &c. Such inheritances cannot be intailed, because they favor nothing of the reality. fol. 20. a. 7 E. 3. 363.

In these cases the grants, &c. hath a fee conditional, and by his grant or release he may bar his heir, as he might have done at the common law, viz. In grant de personal inheritances. Pl. C. Manxels c.

*Idem semper proximo antecedenti refertur.* fol. 20, b.

These words (*de son corps*) are not so strictly required but that they may be expressed by words that amount to as much. 5 H. 5. 6.

*Voluntas donatoris in Charta doni sui manifestè expressa observetur.* Quer. dyc.

If a man make a charter of feoffment of an acre of land to A. and his heirs, and another Deed of the same acre to A. and the heirs of his body, and deliver seisin according to the



the form and effect of both deeds; it shall enure by moities, i.e. to have an Estate Tail in the one moiety, with the Fee Simple expectant, and a Fee Simple in the other moiety, &c. *Fol. 21. a. 2 H. 6. 25. 45 E. 3. 20.*

Se<sup>t</sup>. 17.

Robert gave the reversion of lands, which Agnes his wife did hold for life to Stephan de la More, *Ha'bendum post mortem dictæ Agnetis in liberum Maritagium cum Johanna filia ejusdem Roberti*, and it is adjudged that is a good Estate Tail. *5 E. 3. 17.*

Four things be incident to a frank-marriage. 1. That it be given for consideration of marriage, &c. 2. that the woman or man, that is the cause of the gift, be of the blood of the donor. 3. If the gift be made of a thing which lyeth in tenure (as of Lands, &c. A rent Common, &c.) That the donees hold of the donor at the time of the Estate in frankmarriage made. 4. That the donees shall hold freely of the donor till the fourth degree be past, *fo. 21 b.\**

These words (*in liberum maritagium*) did create an estate in fee simple at the common law. And these are such words of art & so necessarily required, as they cannot be expressed by words *aquipollent*, &c.

Se<sup>t</sup>. 18.\*

*Feodum talliatum*, i.e. *hæreditas in quandam certitudinem limitata*, viz. *Quel issue inheritra per force de tiels dones, & come longement lenheritance endurera.*

A gift made to a man & *hæredi masculo de corpore suo Reg. Judic. fol. 6. Hæredi unide corpore, &c.* An exception from the rule, that all estates Tail were fee simple at the common law. *39 Ass. pl. 20.*

Se<sup>t</sup>. 19.\*

Whensoever the Ancestor takes an estate for life, and after a limitation is made to his right heirs, the right heirs shall not be purchasers, *fol. 22. b. Vide Libr. Non est hæres viventis.* And no diversity when the law creates the estate for life, and when the party. A man seised of lands in fee  
by



by Indenture makes a Lease for life, the remainder to the heires male of his own body, this is a void remainder. So it is of a gift intaile, the remainder to his own right heires for the reversion is in the Ancestor, who during his life beareth in his body, all his heires. And the donor cannot make his own right heire a purchaser of an estate taile without departing of the whole Fee simple cut of him. *Vide Libr. Dier 156.*

If a man make a Feoffment in Fee to the use of himselfe in tail, and after to the use of the Feoffee in Fee, the Feoffee hath no reversion, but in nature of a remainder, albeit the Feoffor have the Estate taile executed in him by the Statute, and the Feoffee is in by the common law. *Dier 362.b.*

Whosoever is seised of Land hath not only the estate of the land in him, but the right to take profits, which is in nature of the use, & therefore when he makes a Feoffment in Fee without valuable consideration to divers particular uses, so much of the use as he disposeth not is in him as his ancient use in point of reverter. *Fol. 23. a. Vide Libr. Dier. 12.* Fealty is incident to every tenure (*exc. frankalm.*) and cannot be separated from it.

*Seft. 20.*

Certain Rules touching degrees, &c: The first is, That a person added to a person in the line of consanguinity maketh a degree. 2. So as how many persons there be, take away one and you have the number of degrees. 3. It is to be noted that in every line the person must be reckoned from whom the computation is made. *Vide Libr. gradus dicitur à gradiendo, quia gradiendo ascenditur, & descenditur. Fol. 24. a. Vide, &c.*

*Seft. 21.*

*Exempla illustrent, non restringunt legem. Æquitas est convenientia rerum, quæ cuncta coequiparat, & quæ in paribus rationibus paria jura & judicia desiderat; & jura respicit æquitatem. Æquitas enim est perfecta quadam ratio quæ jura scriptum interpretatur & emendat. Bract. lib. 4. Fo. 186.*

*Seft.*

Seff. 22: &amp; 23.

*De dones fait en le tail, la volunt del donnr ser. observe.* And these words (*queux doient inheriter*) imply a diversity between a discent and a purchase. Fol. 24. b. *Vide libr. Br. t. done 42. t. nosme 1. & 40.* A gift is made to a man, and to the heirs female of his body, the donee is capable by purchase, and the heir female by discent. Fol. 25. a. 15.

Seff. 24.

*Quacunq̃ue que ser. inheriter per force d'un done en le tail fait as heirs males, covient conveyer son title tout per les heir males.* Fol. 25. a. *Vide 28 H. 6. t. devise c. 18. 1. \**

A devise may create an inheritance by other words then a gift can, yet cannot a devise direct an inheritance to descend against the rule of law. *Vide lib.* 9.

In an Estate Tail, &c. The male must make his conveyance by males, and the female by females.

If A hath issue a son and a daughter, and dieth, and the son hath issue a daughter and dieth, and a Lease for life is made, the remainder to the heirs females of the body of A. In this Case the daughter of A shall not take, because she is not heir. But albeit the daughter of the son maketh her conveyance by a male male, she shall take an Estate Tail by purchase, for she is heir and a female. Fol. 25. b. 11 H. 6. 13. 9 H. 6. 25.

Seff. 25.

No cross remainder, or other possibility shall be allowed by Law, where an Estate is once settled, &c. and taketh effect. As if Lands be given to two husbands and their wives, and to the heirs of their bodies begotten, they have a joint estate for life, and several inheritances. 24 E. 3. 29. a.

Seff. 29. &amp; 30.

20 H. 6. 36. *Vide lib. \* 5 H. 4. 3. a. Fol. 26. b.* A man by Deed gave lands to Em. late wife of I. M. *habend. &c. prædict. E. & hered. I. M: de corpore ejusdem E. procreat.* In this case the son and heir of I. M. begotten on the body of Em, took

no Estate with *Em.* in the lands, because he was named after the *habendum*.

A man seised of two acres of land in fee simple hath issue two daughters and dieth, and the one coparcenor giveth her part to her sister, and to the heirs of the body of her father.

In this case the donee hath an estate tail in the moiety of the donors part; for the donee is not entire heir, but the donor is heir with the donee, and she cannot give to the heirs of her own body, and the donee hath the other moiety of her sisters part for life. *Les heirs, & ses heirs differ.*

For if lands be given to the son, and to his heirs of the body of his father, the son hath a fee simple. But if the land be given to the son, and to the heirs of the body of, &c. *ē. est. ta. f. 27. a.*

*Señ. 31.*

Every estate tail within the statute of *Westm. 2.* must be limited either by expresse words, or words *equipollent* of what body the heir inheritable shall issue. The grant of a subject shall be taken most strongly against himself. \**Fo. 27. b. Vide lib. 18 Aff. p. 5.* Armories are descendible to the heirs males lineal or collateral.

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*Tenant in Tail after possibility*  
C A P. III.

*Señ. 32.*

**T**ENANT in Tail after possibility of issue extinct, hath certain privileges in respect of the privity of his estate, & of the inheritance that was once in him, which Tenant in Tail himself hath, and which Lessee for life hath not. As  
1. He is punishable for waste. 2. He shall not be compelled to attorn. 3. He shall not have aid of him in the reversion.  
4. Upon his alienation no writ of entry in *consimili casu*, lieth.  
5. After his death no writ of intrusion doth lie. 6. He may joyne

joyn the mise in a writ of Right in a special manner. 7. In a *præcipe* brought by him he shall not name himself Tenant for life. 8. In a *Præcipe* brought against him, he shall not be named barely Tenant for life, fo. 27. b.

And yet he hath four other qualities agreeable to a bare Lessee for life, and not to an Estate in Tail. 1. If he make a Feoffment in fee, this is a forfeiture of his estate. 2. If an estate in fee, or in fee tail, in reversion or remainder, descend or come to this Tenant, his estate is drowned, and the fee or fee tail executed. / 3. He in the reversion or remainder shall be received upon his default. 4. An exchange between a bare Tenant for life and him is good; for their estates in respect of their quantity are equal, so as the difference stands onely in the quality.

The state of this Tenant must be created, altered, &c. by the act of God, and not by the limitation of the party, *ex dispositione legis, & non ex provisione hominis. Vide Sect. 33. fol. 28. a. l. 11. Lewes Bowles.*

CAP. IV.

*Curtesie D'engleterre.*

*Sect. 35.*

**A** Man seised of an advowson or rent in fee, hath issue a daughter, who is married and hath issue, and dieth seised, the wife before the rent became due, or the Church void, dieth, she had but a seisin in law, and yet he shall be Tenant by the curtesie, because he could by no industry attain to any other seisin. *Et impotentia excusat legem.*

But if the wife in this case dye before her entry into lands, &c. it is otherwise. *Vide lib. fo. 29. a. Dier 55. 3 H. 7. 5.*

A man shal not be tenant by the curtesie of a bare right,  
 title,

title, use, or of a reversion, or remainder existing upon any Estate of Freehold, unless the particular Estate be determined during the coverture. \* If an estate of freehold in Seignories, Rents, Commons, &c. be suspended, a man shall not be Tenant by the curtesie. As if a Tenant make a Lease for life of the Tenancy to the Seignioresse, who taketh a husband & hath issue, the wife dieth, he shall not be tenant &c. But if the suspension be for years, he shall be Tenant by the curtesie, *fo. 29. b. Vide li. 1 E. 3. 6.* If a woman maketh a gift in Tail, and reserve a rent to her and her heirs, and the donor taketh husband and hath issue, and the donee dieth without issue, and the wife dieth, the husband shall not be tenant by the curtesie of the rent; for that the rent newly reserved, is by the act of God determined, & no Estate thereof remaineth. But if a man be seised in fee of a rent, and maketh a gift in Tail general to a woman, she taketh husband and hath issue, the issue dieth, the wife dieth without issue, he shall be Tenant by the Curtesie of the rent, because the rent remaineth, *fol. 30. a.*

Four things do belong to an Estate of Tenancy by the Curtesie, *viz.* Marriage, seisin of the wife, issue and death of the wife. But it is not requisite that these should concur, &c. at one time, and therefore if a man taketh a woman seised of lands in fee, and is disseised, and then hath issue, and the wife die; he shall enter, and hold by the curtesie. So if he hath issue which dieth before the descent, &c. *Vide lib.* By the custom of Gavelkind, a man may be Tenant by the curtesie without having any issue. *9 E. 3. 38.*

If after issue, &c. ~~in this case~~ the husband maketh a feoffment in fee, and the wife dieth, the feoffee shall hold it during the life of the husband, & the heir of the wife shall not during his life, *in jure sui in vita*; for it could not be a forfeiture, for that the estate at the time of the feoffment was an Estate of Tenancy by the Curtesie initiate and not consummate. *Vod. l. Dier 363. 34 E. 3. Cui in vita 13.*

In divers Cases a man shall by having of issue, be Tenant by the Curtesie, where a woman shall not be endowed, &c. *7 E. 3. 6. 17 Ed. 3. 51.*

A man shall be Tenant by the Courtesie of a Common Sans number, but a woman shall not be endowed thereof. A man entitled to be Tenant by the Courtesie, maketh a feofment in Fee upon condition, and entreth for the condition broken, and then his wife dieth, he shall not be Tenant, &c. for his title, &c. was inclusively absolutely extinct by the Feoffment. \* *Vide librum. fo. 30. b.*

*Tres sont done al Beron & feme, & a les heireo que le baron ingenera de corps sa feme, en ceo case ambideux ont estate en la Tile, pur ceo que cē parol (heires) nest limit a lun plus que a lautre.*

*Leff. 28.*

Nul poit ēre Tenant in taile appears possibility d'issue extinct, forsque un des donees ou le donee en special taile: ne unques serra partie de wast, pur lenheritance que fuit lun foits en luy. Mes cesty en le reversion poit enter, sil alien en fee.

*Seff. 35*

Baron prist feme enheritrix, Sil ad issue per luy ne <sup>e</sup> wife, il scera Tenant per le Courtesie.

I (trust me) was even now so full of my Courtesie, that I had almost forgotten my craft in the taile, wot you what I mean? why, the two last precedent Sections. \* If any before stay behind, Ile bring them after with a witnesse, *Thomas More, Thomas de la More Antecessor meus, miles, creatus fuit, in Parlamento, cum Edwardus Princeps ille niger, dux cornubie creatus fuerit. Anno Regni Reg. Edwardi tertii undecimo. Anno Dom. 1337.*

## C A P. IV.

*Dower:*

*Seff. 36.*

**L**A feme serra endowe de la 3. part des trēs, &c. que fueront a sa baron durant le couverture; issint que el passe l'ago de 9. 49. ans al temps del mort sa baron. lib. 2. fol. 93. Bingham's Case.

C 4

Dowe

Dower in the common Law, is taken for that portion, &c. which the wife hath for term of her life of the lands or tenements of her husbands, &c. *Propter onus matrimonii, & ad sustentationem sui ipsius & educationem liberorum, cum fuerint procreati, si vir premoriatur. Dos, ex donatione, & est quasi donarium, because the law it self doth (without any gift) of the husband himself give it to her; it is commonly taken for the third part which she hath of her husbands lands, &c. After his decease. lib. rub. c. 70. Braſt. l. 2. f. 92.*

To the consummation of this dower, three things are necessary, viz. Marriage, seisin, and the death of her husband. f. 31. a.

*Secundum consuetudinem regni mulieres viduæ, &c. Debent esse quietæ de tallagiis, &c. doti ejus parcat, quia præmium pudoris est. Ockam f. 40.*

Where lands or tenements descend to the husband, before entry he hath but a seison in law, and yet the wife shall be endowed; for it lieth not in the power of the wife to bring to be an actuall seison as the husband may doe of his wifes land, when he is Tenant by the Curtesie F. N. B. 149.

Grandfather, Father and Son, the Grandfather, and father die, &c. In this Case: *dos de dote peti non debet*; if lands descend to the Father; otherwise is it in a purchase, if the Grandfather infeoffe the Father, &c. *Vide lib. 5. Ez. t. Douch. 249. Paris c. Non debent mulieribus assignari in dotem castra quæ fuerunt virorum suorum & quæ de guerra existunt, vel etiam homagia & servitia aliquorum de guerra existentia. Fo. 31. b. Pat. 1. E. 1. Part. 1. m. 17.*

Tenant in Fee Taile generall maketh a feoffment in Fee, and takes back an estate to him and to his wife, and to the heirs of their two bodies, and they have issue, and the wife dieth, the husband taketh another wife, and dieth, the wife shall not be endowed, for during the Coverture, he was seised of an estate Tail special, and yet the issue which the second wife may have, by possibility may inherit. *Vide lib. 41. E. 3. 30. Dier. 41.*

Albeit of many inheritances that be entire, whereof no division



division can be made by metes and bounds, a woman cannot be endowed of the thing it selfe, yet she shall be endowed thereof in a special and certain manner. As of the third part of a piscary, *tertium piscem, vel jactum retis tertium*, &c. Fo. 32. a. 17. E. Dow. 104.

A woman shall not be endowed of a common fans number *en grosse*, nor of an annuity, &c. Nor of Rents, &c. If the freeholds of the Rents were suspended before the coverture. But a woman shall be endowed of Tithes of the third part of profits of Courts, Fines, Heriots, &c. *De nullo quod est sua natura indivisibile, & secationem sive divisionem non patitur nullam partem habebit, sed satisfaciatur ei ad valentiam*, Brac. 97. Brit. 146.

If the heire improve the value of the Land by building, &c. And on the other side, if the value be impaired in the time of the heire, she shall be endowed according to the value at the time of the assignment, and not according to the value, as it was in the time of her Husband. 30. E. 1. Vouch. 298.

It is not necessary that *seisin* should continue during the coverture; for albeit the husband alieneth the Lands, &c. or extinguisheth the Rents, &c. Yet the woman shall be endowed. But it is necessary that the marriage continue, for if that be dissolved the Dower ceaseth. *Ubi nullum matrimonium, ibi nulla dos*; but this is to be understood when the husband and wife are divorced *à vinculo matrimonii*, as in case of precontract, consanguinity, affinity, &c. And not *à mensa & thoro* onely, as for Adultery. In case of elopement, shee shall lose her Dower, but shee is not barred of her appeal. *Sponte virum mulier fugiens & adultera facta dote sua careat, nisi sponso sponte retracta*. Fol 32. b. Mirr. ca. 5. Sec. 5. li. Intract 224. If a man seised of Lands in Fee took a wife, and infeoffed eight persons, Writ of Dower was brought against these eight persons, and two confesse the action, and the other six plead in Barre, and descend to issue, the demandant shal have judgment to receive the third part of two parts of the land in eight parts to be divided, and after the issue being found

for



for the demandant against the fix, the demandant shal have judgement to recover against them the third part of fix parts of the same land in eight parts to be divided, and so in some cases, where the husband was sole seised, the wife shall not be endowed in feveralty by metes and bounds. *M.* 2. and 3. *Eliz. Dier* 187. b.

*Nota.* The endowment by metes and bounds, according to the common right, is more beneficiall to the wife then to be endowed against common right; for there shee shall hold the land charged, in respect of a charge made after her title of Dower. It is necessary for the wife after the decease of her husband, as soon as she can to demand Dower before good testimony; for otherwise she may by her own default lose the value after the decease of her husband, and her dammages for detaining of her dower. *Vide lib. Et Dotes suas habere non possunt sine placito.* The mean values and dammages are to be recovered against the Tenant in a Writ of Dower. *M.* 8. and 9. *Eliz. Rot.* 904. *conj. Banco. Vid. &c.*

If the wife be past the age of 9 years at time of the death of her husband, (albeit he were but 4 years old) she shall be endowed, *quia minor non potest dotem promereri, neque virum sustinere; nec obstat mulieri petenti minor etas viri.* So that albeit *consensus non concubitus facit matrimonium*, and that a woman cannot consent before twelve, nor a man before fourteen. Yet this inchoate or imperfect marriage (from the which either of the parties, at the age of consent, may disagree) after the death of the husband shal give Dower to the wife, *Fo.* 33. a.

*Est, uxor de facto, & de jure.* *Fol.* 33. b. *Vid. &c.* Onely she that is a wife, & *de jure in favorem vite*, shall have an Appeale, &c. But a wife *de facto*, shall have Dower, if divorce be not had, &c. 50. E. 3. 15 10. E. 3. 35.

*Señ.* 37.

*Rationabilis dos est cujuslibet mulieris de quocunq; tenemento tertia pars omnium trium, &c. quæ vir suus tenuit in dominico suo ut de feodo, &c..*

By the custome of Gavelkind the wife shall be endowed of the moiety, so long as she keep her self sole and without child, which she cannot wave, and take her thirds for her life: for *consuetudo tollit communem legem. Stat. de consuet. Cantie, &c.* And as customs may enlarge, so it may abridge and restrain it to a fourth part, &c. *Sententia significeth widowhood, fo. 33.b. in fine marg.*

## Sect. 39.

*Affidare est fidem dare, & sponsalia dicuntur futurarum nuptiarum repromissio & conventio.*

But (this) Dower *ad ostium ecclesie* is ever after marriage solemnized; for that before marriage the woman is not intitled to have dower; certainty is the mother of quiet and repose, *Fol. 34.b.*

The Law hath provided, *quod vidua post mortem mariti sui non det aliquid pro dote sua, & maneat in Capitali messuagio mariti sui per 40. dies post obitum mariti sui, infra quos dies assignetur ei dos sua nisi prius ei assignata fuerit, &c. & habeat rationabile estoverium suum interim in Communi*, yet because there was no penalty, &c. inflicted, the Tenant of the land may drive her to sue for her Dower. *Mag. Chart. ca. 7.*

If the heir, &c. put her out within the 40 days, &c. She may have her Writ *de quarentina habenda*. A jointure made in satisfaction of Dower, is now the surest way, &c. *fol. 34.b.*

Wheresoever the Writ demands Land, Rent, &c. In certain, the demandant after judgement may enter or distrein before any seisin delivered to him by the Sheriff upon a Writ of *habere facias seisinam*. But in Dower, &c. the demandant cannot enter, &c. until execution sued, for the Writ demandeth nothing in certain. Assignment of Dower must either must be by the Sheriff, by the Kings writ, or else by the heir or other Tenant of Land by consent and agreement between them.

If the husband make several feoffments of several parcels, and dieth, and one Feoffee assign Dower to the wife of parcel of Land in satisfaction, &c. The other Feoffees shall

shall take no benefit of this assignment, because they are strangers thereunto and cannot plead the same. But in that case, if the husband dieth seised of other lands in fee simple, &c. And his heir endoweth the wife of certain of those lands in full satisfaction, &c. This assignment is good, and the several Feoffees shall take advantage of it. And therefore if the wife bring a writ of dower against any of them, they may vouch the heir, &c. So as there is a privacy in this respect between the heir and the feoffees, and by this means, the same assignment may be pleaded by the heir that made it. 33 Ed. 3. tit. Judgm. 254, &c.

The assignment must be certain, and absolute, and by such as have a freehold, or against whom a writ of dower doth lie, &c. fol. 35. a. *Vide lib.*

There needeth neither livery of seisin, nor writing to any assignment of dower, because it is due of common right. Assignment must be of some part of the land, or of a rent, &c. issuing out of the same, Dier 91.

#### Señ. 40.

Tenant for life of a carue of land, the reversion to the father in fee, the son and heir apparent endoweth his wife, &c. *Ex assensu patris.* Tenant for life dieth, the husband dieth, this is no good endowment, &c. because the father at the time of the assent, had but a reversion expectant upon a freehold, whereof he could not have endowed his own wife; and albeit the Tenant for life died, living the husband yet, *quod initio non valet, tractu temporis non convalescet.* Fo. 35. a.

If the heir apparent be within age, yet the endowment *ex assensu patris* is good; but otherwise it is of dower *ad ostium ecclesie.* 2 H. 3. Dower 199. Fo. 35. b.

Ten things are necessarily incident to a deed, viz. First, Writing. 2. In Parchment or Paper. 3. A person able to contract. 4. By a sufficient name. 5. A person able to be contracted with. 6. By a sufficient name. 7. A thing to be contracted for. 8. Apt words required by Law. 9. Sealing. 10. Delivery.

Tradition of a deed (only) to the party to whom it is made, is sufficient; and then when words are contrary to the Act which is the delivery, the words are of none effect, *non quod dictum est sed quod factum est inspicitur*. But it may be delivered to a stranger as an escrow, &c. Because the bare Act of delivery to him without words worketh nothing, fol. 36. a. H. 12. R. in C. B. Dier 95.

*Cartarum alia regia, alia privatorum, & regiarum alia privata, alia communis, & alia universitatis. Privatorum, alia de puro Feoffamento & simplici, alia de Feoff. conditionali, sive conventionali, alia de recognitione pura, vel conditionali, alia de quiete clamantia alia, de confirmatione, &c. Verba intentioni, non e contra debent inservire.*

*Carta non est nisi vestimentum donationis, sive orationis. Fleta l. 6. ca. 28. Nemo tenetur armare ad versarium suum contra se. Scriptum est instrumentum ad instruendum quod mens vult. Carta est legatus mentis. Benignæ sunt faciendæ interpretationes cartarum, propter simplicitatem laicorum, ut res magis valeat quam pereat. Bract. l. 2. fo. 94, &c.*

*Nihil tam convenias est naturali æquitati quam voluntatem domini volentis rem suam in alium transferre ratam habere. Plow. Com. fo. 161. b.*

*Re, verbis, scripto, consensu, traditione Junctura vestes sumere pacta solent. Pl. Co. 161. Verba cartarum fortius accipiuntur contra proferentem. Generale dictum generaliter est intelligendum. Verba debent intelligi secundum subiectam materiam. Carta de non ente, non valet.*

#### Señ. 41.

A jointure was no bar of Dower at the Common Law. For a right or title that one hath to a Freehold cannot be barred by acceptance of collateral satisfaction. But now by the statute of 27 H. 8.

If a jointure be made to the wife according to the purview of that statute, it is a bar of her Dower.

Six things are required to a perfect Jointure. 1. It is to take effect for her life in possession or profit presently after the

the decease of her husband. 2. That it be for term of her own life, or greater estate. 3. It must be made to her self, and to no other for her. 4. It must be made in satisfaction of her whole dower, and not of part. &c. 5. It must be either expressed, or averred to be in satisfaction, &c. 6. It may be made either before or after marriage. If the jointure be made before marriage, the wife cannot wave it, and claim her dower at the Common Law; but if it be made after marriage, she may wave the same, &c. *Fo. 36. b. Vide, &c. Dier 358.*

The wife shall not be barred of her jointure, albeit her husband commit Treason or Felony, as she shall be of her Dower *ad ostium Eccle. &c.* By the Common Law. But now at this day by the statute of the 1 *Ed. 6. c. 2.* and 5 *Ed. 6. c. 11.* The wife of a man attainted of Felony shall not lose her dower.

A jointure made to the wife, under or above the age of nine years is good; and so if Dower *ad ostium ecclesie, &c.* being made by assent, &c. *Consensus tollit errorem, fol. 37. a.*

*Seff. 43.*

*Lou le certaintie appiert queux terres, &c. Feme avera per la Dower, la le feme entra apres la mort sa baron, sans assignement de nulluy.*

*Seff. 45.*

The wife shall not be endowed of lands, &c. which her husband holdeth jointly with another at the time of, &c. Of his death: for the jointenant which survivorth claimeth the land by the feoffment, and by the survivorship, which is above the Title of Dower, &c. But Tenants in common have several freeholds and inheritances, and their moieties shall descend to their several heirs, and therefore their wives shall be endowed, *fol. 37. b.*

*Seff. 46.*

*Lissue en le Tail, poit enter sur la possession la feme endowe ad. off. eccles. apres la mort sa baron.*

The

The husband is seised, &c. being within age he cannot by a voluntary Act bind himself: but otherwise is it where he doth an act, whereunto he is compelled by Law. Fo. 38.a. And so an Infant cannot endow his wife *ad osti. eccl.* but he may endow her *ex Aff. paris*; because the Father is sole seised, &c. And the Son hath nothing, &c.

Señ. 48.

Guardian in chivalry, &c. Is not possessed of the Land untill he doth enter, because it is permanent; of the wardship of the body he is possessed before seisure, because it is transitory.

337.

After the guardian hath entred, &c. A Writ of Dower lieth against him, and not against the heire who is Tenant of the Freehold; because the Law hath trusted him to plead for the heire within age, that is in his custody, and also for his own particular interest, &c. Fo. 38.b. *Vide & quere.* 44. E. 3. 13. 4. H. 6. 11.

If the heire (before the gardein enter) endow the wife of more than she ought, and the gardein assigne over his Estate, his Assignee shall have no Writ of Admesurement, because it was a thing in action: But the gardein himselfe shall have a Writ, &c. Stat. West. 2. ca. 7.

And so shall the heire have a Writ &c. At full age: and some have said, that in that case he may have it within age. Fo. 39. a. *Vide, &c. F.N.B.* 149.

*Judiciũ quasi juris dictum*, the very voyce of Law and right, and therefore *judiciũ semper pro veritate accipitur*. In every judgement there ought to be three persons, *actor*, *reus*, & *judex*. Fo. 39. a.

The common Law giveth this priviledge to the Land holden by Knights service, *viz.* That it shall not be dismembred; but the whole Dower taken of the Lands holden in Socage, for that the Knights service is for the defence of the Realm, which is *pro bono publico*, and therefore to be favoured.

Señ. 49. Señ. 50.

*Lon le judgment est fait en Court le roy, ou en aut. Court, &c.*  
le

le feme poit perender ses vicines & en leur presence endow luy in per metes & bounds de la plus beale, &c. que el ad come gardein en socage, & cei ẽ solvaõ del Gardein en Chivalry durant le no-nage lenfant.

Leff. 52.

If a man taketh a wife seised of Lands, &c. In Fee hath issue, and after the wife is attainted of Felony, so as the issue cannot inherit to her, yet he shall be Tenant by the Curtesie, in respect of the issue which he had before the Felony, and which by possibility might then have inherited. But if the wife had been attainted of Felony before the issue, albeit he hath issue afterwards, he shall not be Tenant, &c. Fo. 40. 4. Except the wife be actually seised, the heire shall not make himselfe heire to the wife, and this is the reason that a man shall not be Tenant by the Curtesie of a seisin in Law. Lib. 8 fo. 34. in Paines Case.

Seff. 53.

Si Teniments sont dones a un home, & a les heires que il engendera de corps la feme, en tiel case la feme nad riens, &c. Vnc si le baron devie sans issue, me la feme ser. endowe, per ceo que issue q̃ el per possibility puiroit av. per. me le baron p̃rit inheriter.

53.  
30.  
25 A man seised of land in generall Taile, taketh wife, and after is attainted of Felony, before the Statute of 1. E. 6. The issue should have inherited, and yet the wife should not have bin endowed: For the Statute of West. 2. ca. 1. relieveth the issue in taile, but not the wife in that case. But at this day if the husband be attaint of Felony the wife shall be endowed, and yet the issue shall not inherit the lands which the Father had in Fee simple. If the wife elope from her husband, &c. she shall be barred of her dower, and yet the issue shall inherit.

Seff. 55.

The Law hath inflicted five punishments upon him that is attainted of Treason or Felony. 1. He shall lose his life by an infamous death of hanging, &c. 2. His wife shall lose her Dower. 3. His blood is corrupted, his children made igno-

Notes 20 leaves slip in the figures but note the 600 marked for the table (as I think) follows the error.



ble if, &c. And cannot be heirs to him. 4. He shall forfeit 462  
all his Lands, and Tenements. 5. All his goods and Char-  
tels. / But the wife of a man attaint of Felony shall be endow- 32.  
ed by force of the statute in that case provided.

If the heir be vouched by the Tenant in the Writ of Dower  
in the gard of the gardein, The gardein shall plead it as well  
when he comes in as vouchee, as when he is Tenant. Also if  
the Lands holden in socage be not equall to the lands holden  
in chivalry, some say that the defendant in the Writ of dower,  
must have assets in her hands to the value of her Dower, so as  
he shall not be partly indower against the gardein, and partly  
retain in her own hands. 18. E. 3.4. But by 25. E. 3.5 2.b.  
*auterment est que est melior* opinion, &c.

C H A P. VI.

Tenant a Terme de vie.

Sect. 56.

IF Tenant *per terme dauter vie* dyeth, living *cesty que vie*, he 252  
that first entreth shall hold the land during that other  
mans life ; and he is in Law called an *Occupant*, because his  
title is by his first occupation. And so if Tenant for his own  
life grant over his Estate to another, if the grantee dyeth,  
there shall be an *Occupant* ; so it is if Tenant by the Curtesie  
or Tenant in Dower grant over his Estate, or hers, &c. Fo. 41.  
*a. l. 6. 37. nullum tempus occurrit regi* in this case.

There can be no *occupant* of any thing that *lyeth in grant*,  
and that cannot passe without deed, because every *Occupant* 124.  
must claime by a *que estate*, & *averr.* the life of *Ce' que vie*.  
It were good to prevent the incertainty of the estate of the  
Occup. to add these words (to have and to hold to him and  
to his heirs during the life of *Ce' que vie*) and yet the Lessee  
may assigne it to whom he will, or if he hath already an E-  
state for another mans life without these words, then it were

good for him to assign his Estate to divers men and their heirs, during the life of *Ge' que vie*. Lit. 167. *Dier* 253.

If a Lease be made to A, &c. For terme of his owne life, and the lives of B. and C; the lessee hath but one freehold, which hath this limitation, during his own life, and the lives of two others; and here note a diversity between several estates in severall degrees, and one Estate with several limitations; for in the first, an Estate for a mans owne life is higher then for another mans life; but in the second it is not. *l. 5. Rosses case.*

If Tenant for life infeeble him in the remainder for life, this is a surrender, and no forfeiture; and albeit an Estate for term of a mans own life be but one Freehold, yet may severall Freeholds in certain Cases be derived out of the same, *Vide libr.*

A. and B. joyntenants, A. for life and B. in Fee, joyne in a Lease for life, A. hath a reversion, and shall joyn in an action of Waste. Tenant for life and he in the reversion joyne in a Lease for life, it is said that they shall joyn in an action of wast, and that the lessee for life shall recover the place wasted, and he in reversion, dammages. *Fo. 42.2 F.N.B. 59. F. 13. H. 7. 15.*

If a man make a Lease of a Mannor worth 20. l. *per annum* to another until 100 l. be paid, in this case, because the annuall profits of the Mannor are incertain, he hath an estate for life, if livery be made determinable upon the levying of a 100 l. *Fol. 42. a.*

254. And yet in some Cases a man shall have an incertaine interest in Lands, &c. and yet neither an Estate for life, for years, or at will. As if a man by his will in writing devise his lands to his executors for payment of debts, and untill his debts be paid; in this Case the executors have but a chattell, and an incertain interest in the land untill his debts be paid; for if they should have it for their lives, then by their death their estate should cease, and the debts unpaid; but being a Chattell, it shall go to the executors of executors, &c. And so note a diversity between a devise and a conveyance at the common Law in his life time. *l. 8. Mannings*

*nings.* The Law which abhorreth injury and wrong, will never so construe any Act, &c. as it shall work a wrong; whensoever the words of a Deed, or of the parties without Deed may have a double intendment, and the one standeth with Law and Right, and the other is wrongfull and against Law, the intendment that standeth with Law shall be taken, *Fo. 42. b.*

The Law more respecteth a lesser estate by right, than a larger estate by wrong.

Tenant in taile made a Lease to another for terme of life generally, and after released to the Lessor and his heires; albeit between the Tenant in Taile and him a Fee simple passed, yet after the death of the Lessor, the entry of the issue in Tail was lawfull; which could not be, if it had been a Lease for the life of the Lessee, for then by the release it had been a discontinuance executed.

*Seff. 57.*

*Tenant per vie ad franktenement, & null autre de meind. Estate.* Many that have capacity to take, have no ability to infeoffe, &c. As Aliens borne, Traitors, Felons, &c. Ideots, madmen, a feme covert, an infant, a man by duress, &c. For the feoffement, &c. of these may be avoided. *Brit. fo. 88.*

In judgment of Law, the King as King cannot be said to be a minor, for when the Royall body politique of the King doth meet with the naturall capacity in one person, the whole body shall have the quality of the Royall politique, &c. *omne majus trahit ad se quod est minus.*

A Licence for alienation grew by the Statute of the 20. H. 3. 20. *Aff. pl. 17. by Skipwith. vide lib.*

By the Statute 1 E. 3. ca. 12. & 34. Ed. 3. cap. 15. Although the Kings Tenant in chiefe, &c. do alien all or any part without Licence, yet is there not any forfeiture of the same, but a reasonable fine therefore to be paid.

The Statute of 18. E. 1. *De quia Emptor, &c.* hath in effect as to the common persons, taken away the Statute of *Mag. Charta cap. 32.* for thereby it is provided, *Quod liceat unicuique libero homini trans suas, &c. seu partem inde ad voluntatem su-*

*am vendere, ita quod Feoffatus teneat, &c. de capitali domino.*  
 Note first, that this word *liceat*, proveth that the Tenant could not, or at least was in danger to alien parcell of his Tenancy, &c. upon the said Act of *Mag. Charta*. 2. That upon the Feoffment of the whole, the Tenant shall hold of the chief Lord. 3. That the Tenant might enfeoffe one part to hold *pro particula* of the chief Lord. But this Act (the King being not named) doth not take away the Kings Fine due to him by the Statute of *Mag. Charta*. Tenant by Statute Merch. Statute Staple, or *Elegit*, are said to hold land, *ut libenum Tenementum*, untill their debt be paid; and yet they have no Freehold, but a Chattel, &c. But (*ut*) is similitudinary, because they shall by the Statutes have an Ass. as the Tenant of the Freehold shall have: and yet *nullum simile est idem*. 28. *Ass. p. 7. w. 2. c. 18. St. Merc. 13. E. 1. 27. E. 3. d. 9. 23. H. 8. c. 6. F. N. B. 178.*

## CHAP. VII.

*Tenant for Term of yeers.*

## Sect. 58.

There be three kinds of persons who at this day may make leases for three lives, or XXI yeers, &c. which could not so doe when *Littleton* wrote: *viz.* 1. Any person seised of an estate tail in his own right. 2. Any person seised of an estate in Fee simple in the right of his Church. 3. Any husband and wife seised of any estate of inheritance in Fee simple, or Fee taile in the right of his wife, or joyntly with his wife, before the coverture, or after: And these are made good by the Statute of 32. H. 8. But the Statute of 1. Eliz. 13. El. 18. El. and 1. Reg. Jac. are disabling. *Vide libr. &c. l. 5. fo. 6.*

If two severall Tenants of severall Lands, joyne in a lease for yeers by Deed indenture, these be severall leases; and severall

severall confirmations of each of them, from whom no interest passeth, and work not by way of conclusion in any sort, because severall interests passe from them. Fol. 45. a. Vide & quare.

Whensoever any interest passeth from the party, there can be no estoppel against him. H. 44. El. R. 1459. ca. 8.

Leases for lives or years are of three natures, some be voidable by entry, and some void without entry. Vide, &c. 32. H. 8. c. 28. l. 3. 59. 60. 33. H. 8. Dy.

~~Entry~~ *Terminus* (in Law) doth not only signifie the limits and limitation of time, but also the estate, and interest that passeth for that time. As if a man make a Lease for 21. years, and after make a Lease to begin à *Fine & expiratione predicti termini*, &c. and after the Lease first made is surrendered, the second Lease shall begin presently: but if it had been to begin *post finem & expirationem predict. 21 ann. &c.* the second Lease should not begin, till after the first Terme &c. be ended by effluxion of time. (Fol. 45.) l. 1. 154. l. 8. 145. Pl. c. 198.

*Terminus annorum certus esse debet & determinatus. Id certum est quod certum reddi potest.* 14. H. 8. 14.

The years must be certain when the Lease is to take effect in interest or possession. l. 1. 155. 156. l. 6. 34. 35.

If the Parson of D. make a Lease of his glebe for three yeares, and so from three years to three years, so long as he shall be Parson, this is a good Lease for six years, if he continue Parson so long, first for three years, and after that for three years; and for the rest uncertain. *Terminus vita est incertus*, &c. And therefore if a man maketh a Lease for 21 years if I. S. live so long, this is a good Lease, and yet certain in incertainty. 1. Pl. c. 273.

Any estate for life, being an estate of Freehold, against whom a *Præc. quod redd.* doth lye, is an higher and greater estate then a Lease for yeares. Fo. 45. b.

Albeit a Lease for years must have a certain beginning and a certaine end, yet the continuance thereof may be incertain, for the same may cease and revive again in many Cases. Vide &c. (Fo. 46. a.) 6. E. 6. Dy. 72. accord.

If a *feme covert* leavie a fine alone, If the husband enter and avoyd the fine, and die, the whole estate is so avoyded, as it shall not bind the wife after his death. If a woman be endowed of an Advowson which is appropriated, and thee present, and her Incumbent is admitted, instituted, and inducted, albeit the Incumbent die, yet is the appropriation wholly dissolved; because the Incumbent which came in by presentation, had the whole state in him. 2.E.3.8. *per Scroop*.

A release made to Tenant for years, is not good to him to increase his estate before entry; but he may release the rent reserved before entry, in respect of the privity.

Neither can the Lessor grant away the reversion by the name of the reversion before entry. But the Lessee before entry hath an interest, *interesse termini* grantable to another. (Fo. 46. b.) *Vide &c. D. 454. 567.* If a lease be made to a baron and *feme* for term of their lives, the remainder to the executors of the survivor of them, the husband grant away this terme and dieth, this shall not bar the wife, for that the wife had but a possibility, and no interest. H. 17. El. B. R.

If a lease be made by Indenture, bearing date 26. *Maii*, &c. To have and to hold from the making hereof, or from henceforth, it shall begin on the day in which it is delivered, &c. But if it be *à die confectiois*, then it shall begin the next day after the delivery. l. 2. 5. Pl. Com. 148. l. 5. Fo. 1. Dy. 286. & 307. l. 5. f. 1.

A rent must be reserved out of lands or tenements, where-  
148. unto the Lessor may have recourse to distreine, and therefore a rent cannot be reserved by any common person out of any incorporeall Inheritance, as Advowson, Common Offices, Corrodie, Malture of a Mill, Tythes, Fairs, Markets, Liberties, Priviledges, Franchises, &c. But if the Lease be made of them by Deed for years, it may be good by way of contract, to have an Action of Debt; but distraine the Lessor cannot. Neither shall it passe with the grant of the reversion, for that it is no rent incident to the reversion. But if any rent be reserved in such case upon a Lease for life, it is voyd; for

for that no action of debt doth lie. (Fo. 47. a.) 1.7.23. l. 10. 59.30. Ass. p. 5.

Note a diversity betweene an exception, which is ever part of the thing granted, and of a thing in esse, and a reservation which is alwayes of a thing not in esse, but newly created or reserved out of the Land or Tenement demised. *Ex verbo generali aliquid scribitur. Vide &c.*

Valuable things shall not be distrained for rent, for benefit and maintenance of Trades, which by consequent are for the Common-wealth; as cloth in a Taylors shop, &c. 7.H. 7. 1. b.

Nothing shall be distresse for rent, that cannot be rendred againe in as good plight, &c. but for damage feasant it is otherwise, *Vide, &c.* 11. H. 7. 14. a. 21. H. 7. 39. b. & 2. H. 4. 15.

For rent due the last day of the Term, the lessor cannot distress, because the Term is ended. Fo. 47. b.

Note a diversity between a rent reserved upon a Lease for yeares, reserving a yealy rent: the lessor may have severall actions of debt for every yeares rent. But upon a bond or contract for payment of severall summes, no action of debt lyeth till the last day be past. In every contract there must be *quid pro quo*, for *contractus est quasi actus contra actum*. *Vide, &c.* l. 2. 15. a.

If the Lease be made by Deed Poll, the Lessee is not estopped to say that the lessor had nothing at the time of the Lease made; but if it be by Deed indented, then are both parties concluded, &c. 20. E. 4. 10. 2. E. 2. 253.

*Si hom. pr. Lease de son vr. dem. per fet. indent. lestop. ne continue apres le terme expire. M. 31. 32. El. in 8. Fo. 44. &c.*

Sect. 59.

*Il ne besoigne asc' livery de seisin desire fr. al lessee per ans, mes il poit emier quant il voit per force de m. le Leas: mes lou franktenement passa. auterment est.*

A livery in Deed, may be done either by a solemne act and words, as by delivery of the ring, or halpe of the door, &c. And the Feoffor saying, here I deliver you seisin and possession



feſſion of this houſe, in the name of all the Lands and Tenements contained in this Deed, according to the form and effect of this Deed. Or by words without any ceremony or act; as the Feoffor being at the houſe door, or within the houſe, ſaying, here I deliver you ſeiſin, &c. in the name of ſeiſin & poſſeſſion of all the Lands, &c. contained in this Deed. For if words may amount to a livery within the view, much more it ſhall upon the land. (Fo. 48. a.) 4. 41. E. 3. 17. b. 41. Af. p. 10. l. 6. 26.

These words, *ſecundum formam carta*, are underſtood according to the quantity and quality of the effectually eſtate contained in the Deed. 7. E. 4. 25. 29. Af. 40.

If A. by Deed give land to B. to have and to hold after the death of A. to B. and his heires, this is a void Deed, becauſe he cannot reſerve to himſelf a particular eſtate; and conſtruction muſt be made upon the whole Deed, &c. Fo. 48. b. Vide, &c. M. 33. 34. El. B. R. Hog. & X. 8. 20. 21.

A livery in Law is when the Feoffor ſaith to the Feoffee being in view of the houſe or land (I give you yonder Land to you and your heires, and go enter, &c. and take poſſeſſion thereof accordingly) and the Feoffee doth accordingly in the liſe of the Feoffor enter, this is a good Feoffment, for *ſignatio pro traditione habetur*.

And livery within the view is good, where there is no Deed of Feoffment. 9. E. 4. 39. 38. E. 3. 11.

And note, a livery in law, ſhall be perfected and executed by an entry in law. 38. Af. p. 23.

If a man be diſſeiſed, and make a writing of a Leaſe for years, and deliver the Deed, and after deliver it upon the ground, the ſecond delivery is void, for the firſt delivery made it a Deed; and for that the Leaſe for years muſt take effect by the delivery of the Deed, therefore the Deed delivered when he was out of poſſeſſion was void. But ſo it is not of a Charter of Feoffment, for that takes effect by the livery and ſeiſin. But if the Leſſor had delivered it as an eſcrowe, to be delivered as his Deed upon the ground, this had been good. (Vide libr.) l. 3. 35. Jennings. Brag.

Of Freehold and inheritances some be corporeall, as lands, &c. these are to passe by livery of seisin, by Deed or without Deed; some be incorporeall, as Advowsons, Rents, Commons, &c. These cannot passe without Deed, but without any livery. *Et est traditio de re corporali de una persona in personam de manu, &c. & quia non possunt res incorporales possideri sed quasi, ideo traditionem non patiuntur, &c. Bract. lib. 2. c. 18.*

In some cases a Freehold shall passe by the common law, without livery of seisin: as if a house or Land belong to an office, by the grant of the office by Deed, the house, &c. <sup>125.</sup> passeth as belonging thereunto. *Vide &c.* So if the house belong to a Corodie, by the grant of the Cor. the house passeth. 31.H.6.16. 8.H.7.4.

Sect. 60.

*Lease est fait per ans, le remainder ouster a un autre per vie; en cest case livery de seisin est requisite, ou autrement rien passa a celluy en remainder.*

But livery cannot be made to the next in remainder, because the possession belongs to the Lessee for years; and for that the particular terme, and all the remainders in law make but one estate, and take effect at one time, therefore the livery is to be made to the Lessee. *Remanere* is a residue of an estate depending upon a particular estate, and created together with the same. A man being absent cannot take a Freehold by a livery, but by his Attorney being lawfully authorized to receive livery by Deed, unlesse the Feoffment be made by Deed, and then livery to one (Jointenant) in name of both is good. (Fo. 49. b.)

If a man deliver a Deed without saying any thing, it is a good delivery, but to a livery of seisin of land words are necessary. *Vide, &c.*

A man makes a Lease for years to A. the remainder to B. in Fee, and makes livery to A. within the view: this livery is void, for no man can take by force of a livery within view, but he that taketh the freehold himselfe.

By the entry of the Lessee he is in actual possession, and then

{ then the livery cannot be made to him that is in possession, for, quod semel meum est, amplius meum esse non potest. Vide, &c.  
*Affectio tua nomen imponit operi tuo. Bract. lib. 1.*

But the disseisor in feoff, the disseisee and others, albeit the disseisee came to take livery, he is remitted to the whole.

Sect. 62. &c.

An exchange of Lands, &c. is good without livery of seisin. And in case of a fine which is a Feoffment of Record, of a deviser by a last will, of a surrender of a Release, or confirmation to a Lessee for years, or at will. In all these cases and some other, a Freehold, &c. may passe without livery, *Fo. 50. a.*

In exchanges many things are to be observed. First, that the things exchanged need not to be in esse at the time of the exchange made, ( I grant a rent newly created out of my Lands in exchange, for the Mannor of D.) this is a good exchange. 2. There needeth no transmutation of possession, and therefore a Release of a rent, or estovers, or right to Land in exchange for Land is good. 3. The things exchanged need not to be of one nature, so they concerne Lands or Tenements. As Land for rent or Common, &c. *Vide, &c. Fo. 50. b.* But annuities, &c. which charge the person onely, cannot be exchanged, &c.

Sect. 64, and 65.

There be five things necessary to the perfection of an exchange: 1. That the Estates given be equal, viz. that there be equality of the quantity of the estate, as if the one hath a Fee-simple, &c. the other shall have a like Estate, &c. But equality in value of Lands in an exchange, is not requisite; neither equality in the quality or manner of the estate. 2. That this word (excambium exchange) be used, which is so individually requisite, as it cannot be supplied by any other word, or described by any circumloquution. 3. That there be an execution by entry or claime in the life of the parties. 4. That if it be of things that lye in grant, it must be

be by Deed. 5. If the Londs be in severall Counties, there ought to be a Deed indented ; or if the thing lie in grant (as an Advowson, &c.) albeit they be in one County, fol. 51. a. & b.

The agreement of the parties cannot make that good which the law maketh void.

Sect. 66.

The interest of the terme doth passe and vest in the Lessee for yeers before entry ; and therefore the death of the Lessor cannot devest that which was vested before.

Infants, Feme coverts, persons attainted, outlawed, excommunicated, villains, aliens, &c. may be private Attorneys to deliver seisin, fo. 52. a. vide & quare.

The authority of an Attorney is twofold, expressed in his Warrant, and implied in law ; both which he must pursue ; and if he do lesse, it is voyd. 12. Ass. p. 24. 274.

There is a diversitie between an Authority coupled with an interest, and a bare Authority. fo. 52. b. vide &c.

The Custome that enableth the Lord of a Manor to grant a greater estate, enableth him to grant a lesser. *Omne majus continet in se minus.* H. 36. El. R. 492. Barnes B. R.

A letter of Attorney may be contained in a Deed of feoffment, beginning, *Omnibus Christi fidel.* &c. for one continent may contain divers Deeds to severall persons : but if it be by Indenture, &c. it is otherwise.

Though the Attorneys warrant be generall, to deliver seisin : yet hee cannot deliver seisin within the view ; for his warrant is intendable (or implied) in law, of an actuall and expresse livery, and not of a livery in law. P. 3. El. in C. B. in Tachams case.

*Oportet quod donationem sequatur rei traditio, etiam in vita donatoris, & donatoris.* Bract. l. 2. fo. 16.

Therefore a letter of Attorney to deliver livery of seisin after the decease of the Feoffor, is voyd. But this is to be understood of sole persons &c. and not of a Congregation aggregate of many persons capable. 18. H. 8. 3. 11. H. 7. 19.

Sect.

## Sect. 67.

There be two kinds of Wasts, viz. Voluntary and Actuall, or Permissive. Waste may be done in houses, by pulling them down, or by suffering the same to be uncovered.

If the Tenant do or suffer Waste to be done in houses, yet if he repair them before any action brought, there lieth no action of Waste against him; but he cannot plead, *quod non fecit vastum*, but the speciall matter.

If the tenant build a new house it is waste, and if he suffer it to be wasted, it is a new waste, 42. E. 3. 21.

If the tenant suffer the houses to be wasted, and then fell down Timber to repair the same; this is a double waste, 44. E. 3. 44. F. N. B. 59. B.

Note, there is a waste, Destruction, and Exile. Waste properly is in houses, gardens, and in timber-trees, either in cutting of them down, or topping of them, or doing any act whereby the timber decaies. The cutting of dead wood, that is, *ubi arbores sunt aride, mortue, cava, non existentes marhemii, nec portantes fructus, nec folia in astate*, is no Waste, Dier. 332.

If the tenant cut down underwood (as he may by law) yet if he suffer the young germins to be destroyed, this is destruction, 20 E. 3. Waste 32. 10 H. 7. 2.

Exile or destruction of Villains, or tenants at will, or making them poor, where they were rich when the tenant came in, whereby they depart from their tenures, is Waste, fol. 53. a. & b. vide libr.

If the estate of the reversion continueth not, but is altered, the action of Waste, for Waste done before (which consists in privity) is gone.

An action of waste doth lie against the Assignees of tenant by the Curtesie, and of tenant in Dower, and against the Assignee of the Guardian in Chivalry: in all other cases the action of waste shall be brought against him that did the waste. fo. 54 a. vide, &c.

An Infant, a Baron and Feme, shall be punished for waste done by a stranger; and so shall the wife that hath the estate by survivor, for waste done by the husband in his life time, if she agree to the estate. *F. N. B. 36. b.*

If a lease be made to A. for life, the remainder to B. for life, the remainder to C. in fee: After the death or surrender of B. in the mean remainder, an Action of waste doth lie. But if a lease for life be made, the remainder for years, the remainder in fee, an Action doth lie presently during the term in remainder.

But if a man make a lease for life or years, and after grant the reversion for years, the lessor shall have no Action of waste during the years; for he himself hath granted away the reversion, in respect whereof hee is to maintain his Action. Otherwise it is, if hee had made a lease in reversion, which had been but a future interest, &c. *Vide &c. 4. E. 3. 18. F. tit. Waste.*

No Action of waste lieth against a Guardian in Socage, but an action of trespass: Nor against Tenant by Statute Staple, &c. or Elegit. *Stat. Marlebridge, cap. 17. F. N. B. 59. E.*

See in the Register five severall writs of waste; Two at the Common law, for waste done by Tenant in Dower, or the Guardian; and three by speciall or statute Law, for waste done by Tenant for life, for years, and Tenant by the courtlesie.

*Qui hæret in littera, hæret in cortice. Vide &c.* As tenant for half a yeer is within the remedy of *Stat. Glouc. 5.* which giveth waste against a lessee for life or yeers.

Lessee for life, the remainder to him for 21 yeers, he hath both estates in him so distinctly, as he may grant away either of them: For a greater estate may uphold a lesser, but not e converso. *fol. 54. b.*

If a man make a lease for life to one, the remainder to his Executors for twenty one yeers, the term for yeers shall vest in him: For even as an Ancestor and an Heir are correlativa, as to inheritance (as if an estate for life be made to A. the

remainder to *B.* in taile, the remainder to the right heires of *A.* the fee velteth in *A.* as if it had been limited to him and his heires) even so are the T. stators and Executors *Correlatus* as to any Chattel.

## C H A P. VIII

## Of Tenant at will.

Sect. 68.

EVERY lease at will must be in law, at the will of both parties. *Posseſſio precaria & nuda & pro voluntate domini potest revocari, fol. 55. a. Fleta. l. 3.*

Tenant at will shall reap the crop which he sowed in peace, albeit the lessor doth determine his will before it bee ripe; for that the estate of the lessee is uncertain, and it is good for the Commonwealth that the ground be sown. And this is not onely proper to a lessee at will; but to every particular tenant that hath an estate uncertain. And therefore if tenant for life soweth the ground, and dyeth, his executors shall have the Corn. And the same law is for lessee for years of tenant for life. So if a man be seised of land in the right of his wife, &c. his executor shall have the Corn. But if husband and wife bee joynt-tenants of the land, and the husband soweth the ground, and the land surviveth to the wife, it is said that she shall have the Corn, *Dier 316.*

But where the estate of the lessee being uncertain, is defeasible by a right Paramount, or if the lease determine by the act of the lessee, as by Forfeiture, Condition, &c. There he that hath the right Paramount, or that entrench for any forfeiture, &c. shall have the Corn. *fol. 55. b. l. 5 106*

If a disseisor sow the ground and sever the Corn, and the disseesee re-enter, he shall have the Corn, because he entrench by a former title, and severance or removing of the Corn



Corn altereth not the case ; for the regresse is a continuati-  
on of the Freehold in him in judgment of law from the begin-  
ning.

If the husband and wife make a lease at will of the wifes  
land, reserving a rent, and the husband dye, yet the lease  
continueth. So if a lease be made by two to two others at  
will, and the one of the lessors or of the lessees dye, the  
lease at will is not determined, &c. l. 5. 10. *Hensheads case*,  
*Dier 269. b. \**

*Quando lex aliquid alicui concedit, concedere videtur & id sine  
quo res ipsa esse non potest. 14 H. 8. 2.*

If the lessee at will be disturbed of his free entry, egress  
and regresse to carry away his Corn, &c. he shall have his ac-  
tion upon his case, and recover his damages ; for whensoever  
the law giveth any thing, it giveth also a remedy for the same,  
*fo. 56. a.*

Any Inhabitant of *Southmark* having by custom a watering  
place for Cattel, which being ~~stopped~~ <sup>stopped</sup>, may have an action. &c.

*Sect. 69. and Sect. 70, 71, & 72.*

Messuagium, containeth Buildings, Curtelage, Or-  
chards and Garden. A *Præcipe* lieth not *de Domo*, but *de Mes-  
suagio*.

Nothing that is contrary to reason is consonant to Law.

*Si home fait un ft. de scoffment de terre &c. a un autre, & de-  
liver a luy le fait, mes nemy livery de seisin, en ceo case le scoffee en-  
ter, & tener a volunt. &c.*

The lessor hath no remedy at all against tenant at will for  
permissive Waste, *fo. 57. a.* If tenant at will grant over his  
estate, and the grantee enter, he is a disseisor, and the les-  
sor may have an action of trespass against him, though the  
grant is void, for the will is determined.

A Trespass or Transgression passeth that which is right.  
*Transgressio est cum modus non servatur nec mensura: debet  
enim quilibet in suo facto modum habere, & mensuram.* Nota,  
in the lowest offences there are no Accessories, but all are  
Principals, as in Riots, Routs, Forcible entries, &c. and so  
in



without Copiholders, and then is the Steward the Register ; So there may be a customary Court of Copiholders only, &c. then is the Lord or his Steward the Judge.

And when the Court Baron is of this double nature, the Court Roll containeth as well matters appertaining to the customary Court, as to the Court Baron.

*Manerium dicitur a manendo, secundum excellentiam sedes magna fixa & stabilis. Et sciendum est quod Manerium poterit esse per se ex pluribus edificiis coadjuvatum sive villis & Hamletis adjacentibus Poterit etiam esse Manerium & per se & cum pluribus villis, & cum pluribus Hamletis adjacentibus, quorum nullum dici poterit Maner. per se, sed villæ suæ Hamlettæ, poterit etiam esse per se Manerium Capitale, & plura continere sub se Maneria non Capitalia, & plures villas & plures Hamlettas quasi sub uno capite, aut domino suo. Bract. l. 4 fo. 212.*

Tenant for years, Tenant by Stature Merch Staple, Elegit, Gardian in chivalry, &c. who are not properly seised but possessed, are *domini pro tempore*, not only to make admittance, but to grant voluntary Copies of ancient Copihold Lands which come into their hands. Fo. 58.b.

And in some special Case an estate may be granted by Copy, by one that is not *dominus pro tempore*, &c. As if the Lord of a Manor, by his will in writing, deviseth that his executor shall grant the Customary Tenements of the Mannor according to the custome of the Mannor for the payment of his debts, and dieth, the executor having nothing in the Mannor, may make grants, &c. *Consuetudo*, properly signifieth a custome, as here, &c. But legally it signifieth also *Tolles, Murage, Pontage, &c.*

sect. 74. and 75.

*Et tiel Tenant ne poit alien sa terre per fait, &c. Fo. 59 a.*

But when a man hath but a right to a Copihold, he may release it by Deed or by Copie, to one that is admitted Tenant *de facto*. l. 4. 24. b. *Kite & Queinton.*

*Foris facere i. e. extra legem seu consuetudinem facere, to do a thing*

thing against or without Law or Custome, and that legally is called a forfeiture.

*Si tiel tenant voit alien sa terre a un aut. il covient, &c. de surrender les tenements en asc' Court, &c. en le main le signior, al usc celuy que at avera le state.*

*Ils nont autre evidence concernant leur tenements, forsque le. Copies des Rolles de Court.*

Of Fines due to the Lord by the Copyholder, some be by the change or alteration of the Lord, and some by the change of the Tenant; the change of the Lord ought to be by the Act of God, otherwise no Fine can be due, but by the change of the Tenant either by the act of God, or by the Act of the party a Fine may be due. Of Fines taken of Copyholders, some be certain by custome, and some be incertain; but that Fine though it be *incertus*, yet must it be *rationabilis*. Fo. 59.b. *Vide, &c.*

The Lord of a Manor is described by *Fleta*, as he ought to be, in these words. *Fleta lib. 2. ca. 65. & 71.*

*In omnibus autem & supra omnia decet quemlibet dominum verbis esse veracem, & in operibus fidelem, deum & justitiam amantem, fraudem & peccatum odientem, voluntariosque, malevolos, & injuriosos contemnentem, & apud proximos pietatem vultumque moribilem & plenum, ipsius enim interest potius consilio, quam viribus uti, proprio arbitrio: non cujuslibet voluntarii juvenis menestralli vel adulatoris, sed jurisperitorum virorum fidelium & honestorum, & in pluribus expertorum consilio debet favere. Qui bene sibi vult dissonere & familie sue, scire veram executionem terrarum suarum, necessarium erit, ut perinde sciat quantitatem suarum facultatum, & finem annuarum expensarum.*

*Quæ omnia distinctè scribantur in membranis, ut perinde sagacius vitam suam disponat & facilius convincat mendacia compositionum.*

SECT. 76, and 77.

If by custome, Copyhold may be intailed, the same by like custome by surrender may be cut off.

Some have holden that there was a *Formodon* in the descender

der at the common Law. 10 E. 2. Formedon. 55, &c.

Si le signior ousta tiels tenants, &c. ils nont aut. remedy, forsque de fuer a lour signiors per Petition; car autrement ils ne serrent diis tenants a volent le Seignior, &c. Mes le Seignior ne voile enfreind le Custome que est reasonable en tiel case. Mes Brian. H. 21. E. 4. dit que, si tiel tenant per le custome paient ses services soit ejet per se Seignior, que il avera action de trns. vers luy. Et issint Danby M. 7. Ed. 4. dit, que le tenant per le custome ẽ cibien inheriter daver son tẽr solonque le custome, come cesty que ad franktenuement al common ley.

## CHAP. X.

### Tenant per le vergs.

sect. 78.

**C**ustome que nẽst pas encounter reason põt bien estr. admit Seneschallus is derived of *Stein* an house or place, and *Schalc.* an Officer or Governour; some say that *Sen* is an ancient word for Justice, so as *Seneschall* should signifie *Officiarius justitiæ*. In this place it signifieth an Officer of Justice, viz. A Keeper of Courts, &c. *Flota. lib. 2. ca. 66.* Describeth his Office at large most excellently.

*Providiat sibi Dominus de Seneschallo circumspecto & fidelis, viro provido & discreto & gratioso, humili, pudico, pacifico, & modesto, qui in legibus consuetudinibusque provincie & officio Seneschalcie se cognoscat & jura domini sui in omnibus teneri affectet, quiq; sub ballivos domini in suis erroribus & ambiguis sciat instruere & docere, queque egenis parcere, & qui nec prece vel pretio velit a tramite Justitiæ deviare, & perverse judicare, cujus officium est, Curias tenere Maneriorum & de subtractionibus consuetudinum, serviciorum, reddituum, sect' ad Cur. Mercata, Molendina domini, & ad visas francpledg: aliarumq; libertatum domino pertinentium inquirit, &c.*

## Sect. 79.

**Ballivus**, Bayliff signifieth a safe Keeper, or protector. **Præfectus** or **Præpositus**, **Reve**, signifieth a disposer or director. *Vide Fleta lib. 2. cap. 67.* Where he treateth of the Office of the Bayliff. And *cap. 69.* Of the office of the Reve, or reeve, &c.

*Ballivus autem Cujuscunq; Manerii esse debet in verbo verax, & in opere diligens & fidelis, ac pro discreto approvatore cognitus plegiatus & clericus, qui de communioribus legibus pro tanto officio sufficienter se cognoscat, & quod sit ita justus, quod ob vindictam seu cupiditatem non quærat versus tenentes domini nec alios, &c.*

*Præpositus autem tanquam approvator & cultor optimus, &c. Domino vel ejus Seneschallo palam debet presentari cui injungatur officium illud indilate, non ergo sit piger aut somnolentus sed efficaciter & continue commodū domini adipisci nitatur & exarare, &c.*

## Sect. 80, &amp;c. 81.

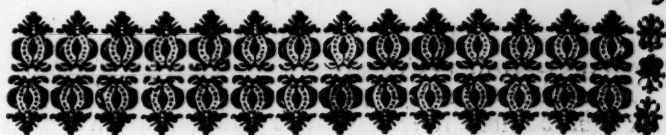
Whatsoever is not against reason may well be admitted and allowed. This is not to be understood of every unlearned mans reason, but of artificiall and legall reason warranted by authority of Law. *Lex est summa ratio Fo. 62. a.*

## Sect. 81, 82, 83, &amp;c.

**Tenant per le Custome**, &c. sont appellez tenants per base tenure, pur ceo que ils nont asc' franktenement per le course del common ley. Tiel tenant en asc' lieux doit repaire measons, &c. Auxi il ferra fealty. Mes tenant a volunt per le Common ley, nemy; & si tiel tenant que est ejus per Lease al Comon ley mor. & son heire enter, le lessior avera action de trns. enū. luy; autrement est de tenant a volunt per le **Custome**, &c. *Vide Diversitat. &c.*

*Consuetudo Manerii est observanda.* But if there be no Custome to the contrary, waite either permissive or voluntary of a Copiholder, is a forfeiture of his Copihold. The doing of fealty by a Copiholder, proverth that so long as he observes the custom of the Mannor and payeth his services, he hath a fixed estate. *Vide Cook. Report. lib. 4. fo. 21, 22, 23, &c.*

*Finis Libri primi.*



## *Liber Secundus.*

### CHAP. I.

#### *Homage.*

*Seff. 85.*



*Omage est le plus honorable service, et le plus humble service de reverence, que franktenant poit faire a Son Seignior. 1. It is most honourable, &c. For, honour plus ē in honorante, quam in honorato. 2. It is plus humble de reverence, for the Tenant when he doth his Homage is, discinctus, nudo capite. Ad pedes domini super genua projectus. Ambas manus vinctas inter manus domini porrigit, & per verba omni supplici veneratione plena, he saith, jeo deveigne vostre home, &c.*

Deber quidem tenens \* manus suas utrasque ponere inter manus utrasque domini sui, per quod significatur ex parte domini protectio, defensio, & warrantia; & ex parte tenentis reverentia & subjectio. *Fo. 65.a.*

*Homagium ligeum, is due to the King onely.*

The King is soveraigne Lord, or *Lord paramount*, either mediate or immediate of all and every parcell of land within



The Realme ; for all the Lands, &c. were originally derived from the Crown. 18 E. 3. 35.

Item videndum est quis potest homagium facere. Sciendum est quod quilibet liber homo tam masculus quam femina, Clericus & Laicus, Major & Minor, dum tamen electi in Episcopos, post consecrationem hom. non faciant, quicquid fecerint ante, sed tantum fidelitatem. Conventus autem hominum non faciet de jure sicut nec Abbas, nec Prior, eo quod tenent nomine alieno sc. nomine Ecclesiarum. Mirror cap. 1. S. 2. & ca. 2. Sect. 1. & 2. Fo. 65. b. \*

Nil sine prudenti fecit ratione vetustas.. Fo. 65. a.

Nunquam prospere succedunt res humanæ, ubi negliguntur divinæ. Fol. 64. b.

Sex horas somno, todidem des legibus æquis.  
Quatuor orabis, des Epulisque duas.  
Quod superest ultro sacris largire camenis.

Sect. 86. and 87.

*Nota*, in old Books and Records, the Homage which a Bishop, Abbot or other man of Religion doth, is called fealty, for that it wanteth these words (*cioo deveign vostre home*) But yet in judgement of Law it is Homage, because he saith, I do to you homage, &c. and so of a Woman.

Argumentum ab inconvenienti plurimum valet in lege.

Non solum quod licet, sed quid est conveniens est considerandum, nihil quod est inconveniens ē licitum.

Sect. 89. and 90.

*Nul fer. homage, mes tiel que ad estate in fee simple ou en fee taile, en son drt. dem. ou endroit dun auter.*

*Si un home ad severall tenancies queux il tient de severall seigneurs, per homage, donques quant il ft. homage a un des seigneurs, il dirra en le fine de son homage fait, salve la foy que ido doy a nature seigneur le Roy & a mes auters seigneurs.*

Non Corporation aggregate of many persons capable, shall do homage ; because that homage must be done in person, and a Corporation, &c. cannot appear in person. But an Abbot

Abbot in nature of a sole Corporation shall do homage; because the Covent are all dead persons in law. *Vide* *fo. 66. b. \** *lib. 4. 11. l. 7. 10.*

*Contra negantem principia non est disputandum.*

A Parson or Vicar of a Church that hath a qualified fee, and yet to many intents upon the matter but an estate for life, can neither receive homage nor do homage, as a Bishop, &c. that a fee absolute may.

Tenant per le Curtesie, &c. ne ferre homage, &c. per ceo que il adonq; nad estate forsq; per terme de vie. *Et Nota.*

He that cannot receive homage in respect of the weakness of his estate in the Seigniorie, shall not do homage if he hath a like estate in the tenancy, *fo. 67. a. vide lib. &c.*

Primogenita filia tantum faciet homagium Domino pro se & omnibus sororibus suis. Quia omnes sorores sunt quasi unus hæres de una hæreditate, *14 H. 3. tit. Prærog. 5.*

Every tenant in common shall do severall services.

If homage be parcell of a Tenure, it is a presumption that the Tenure is by Knights service, unless the contrary be proved.

## CHAP. II.

### Fealty.

*Seff. 91, 92, 93, and 94.*

**T**enant for years shall do Fealty, *Litt. fo. 29. nu. 132.*  
*Sciendum est quod non per procuratores nec per literas fieri poterit homagium, sed in propria persona tam domini quam tenentis, capi debet & fieri. Bract. lib. 2. fo. 8.*

Mes le Seneschal del Court le Signieur ou Baylife poit purender fealtie pur le Seignieur. Item tenant a terme de vie ferre fealty & encore il ne ferre homage. *Sic vide diversitatem.*

The tenant must do fealty in person, because he must be sworn unto it, and no man can swear by the Common Law by Attorney or Proctor, *fo. 68.8.*

Whosoever is above the age of 12 years, is to take the Oath of Allegiance, and he is to be sworn in the Tourne, unless he be within some Leet, and then in the Leet.

### CHAP. III.

#### Escuage.

*Sett. 94.*

**S**cutagium (id est) servitium scuti.

Nomina si nescis perit cognitio rerum.

*Bracton* saith, Item scutagium dicitur quod talis præstatio pertinet ad scutum quod assumitur & servitium militare, *fol. 68. b.*

Every Tenure by Escuage is a Tenure by Knights service. *Sed non è converso.* But note here the wisdom of Antiquity, *Mavult enim princeps domesticos quam stipendiarios bellicis apponere casibus*, lib. rub.

Quant le Roy fait royall voiage en escoce, &c. dunque il que tient per un fee de Chivaler, &c. covient erre oue le Roy per 40. jours, bien & convenablement array pur le guerre, & sic de cæteris, &c.

In the ancient Treatise, *De modo tenendi Parliamentum tempore Regis Edw. filii Regis Etheldredi*, it appeareth, That Comitatus (to wit) an Earldom constat ex viginti feodis unius militis, quolibet feodo computato ad viginti libratas. Baronia constat ex 13. feodis, & 3. parte unius feodi militis secundum comput' prædictam; unum feodum militis constat ex terris ad valentiam, 20. l. fol. 79. a.

A Marquildome consists of the Revenue of two Baronies, which amount to 800 Marks. And a Dukedom consists of the

the Revenues of two Barldoms, viz. 800 pounds *per annum*, *fil. 79. b.*

Note, That the relief of a Knight, and all above him which be Noble, is the fourth part of their yearly revenue, as of a Knight 5<sup>l</sup>, which is the fourth part of 20<sup>l</sup>, &c.

*Edward* the eldest Son of King *Edw. 3.* called *The Black Prince*, was the first Duke in *England* after the Conquest; and *Robert Vere* Earl of *Oxford* in the reign of *R. 2.* was the first Marquis. *Et Dominus de Bellomonte* was the first Viscount created by King *H. 6.*

A voyage Royal is not only when the King himself goeth to War, as *Littleton* here saith, but also when his Lieutenant, or Deputy of his Lieutenant goeth.

He that holdeth by Castle gard or Cornage, holdeth by Knights service, and yet he shall pay no Eſcuage, because he holdeth not to go with the King to War.

Sir *Richard Rocgeſly* Knight did hold Lands at *Seaton* by Seargeanty, to be *vantrarius Regis*, the Kings fore Footman when the King went to *Gascoigne*, *donec per usus fuit pariſolutarum precii* 4<sup>d</sup>. that is, untill he had worn out a pair of shooes of the price of four pence.

And this service being permitted to be performed when the King went to *Gascoigne* to make war, is Knights service. See an ancient Record, *Rot. de finibus Termino Mich. 11. Edw. 2.*

If the tenant *peravaile* goeth with the King, it excuseth all the means, &c. For one tenancy shall pay but one Eſcuage, *F. N. B. 83, 84.*

### Sect. 96.

Albeit the Tenure is, That he which holdeth by a whole Knights fee ought to be with the King, &c. to do a corporal service, yet he may finde another able man to do it for him. But it may be objected; That in some particular cases the tenant might finde a man, but not when he himself is able without all excuse or impediment. To this it is answered, That *sapiens incipit a fine*. And the end of this service

vice is for the defence of the Realm, and ſo it be done by an able and ſufficient man, the end is effected.

2. Seeing there are ſo many juſt excuſes of the tenant, it were dangerous, and tending to the hindrance of the ſervice, if theſe excuſes ſhould be iſſuable, *Multa in jure communi contra rationem diſputandi pro communi utilitate introducta ſunt.*

3. Both *Linteton* and the book in 7 Ed. 3. giveth the tenant power, without any excuſe to be ſhewed, to finde an able and ſufficient man, and oftentimes *Fura publica ex privato promiſcus decidi non debent.*

*Præpoſtera lectio, & præpropæra praxis*, are enemies to learning, fol. 70. b.

Ceſſante ratione legis, ceſſat ipſa lex. If Mayor and Commonalty convey over their Lands holden by Knights ſervice to any natural man and his heirs, now Homage-ward, &c. belong to the Tenure, &c.

Note, That every Biſhop in *England* hath a Barony, and that Barony is holden of the King in *Capite*, and yet the King can neither have Wardſhip or relief.

*Nemo militans Deo implicetur ſecularibus negotiis.*

*Ferdwit* in Saxon ſignificat quietanciam murtheri in exercitu. *Worſcot* ſignifieth, Liberum eſſe de oneribus armorum, fo. 71. a. *Fleta lib. 1. cap. 42.*

Miles hæc tria curare debeat, corpus ut validiſſimum & peſnicioſiſſimum habeat, arma apta ad ſubita imperia, cætera Deo & Imperatori curæ eſſe. *Livius.*

Sapiens non ſemper ita uno gradu, ſed una via, non ſe mutat ſed aprat. Qui ſecundos optat eventus, dimicet arte non caſu. In omni conſlictu non tam prodeſt multitudo quam virtus. *Vegetius.*

Eſt optimi ducis ſcire & vincere, & cedere prudenter tempori. Multum poteſt in rebus humanis occaſio, plurimum in bellicis. *Polibius.*

Quid tam neceſſarium eſt quam tenere ſemper arma quibus teſtus eſſe poſſis. *Vegetius.*

Concerning the point in Law demurred in judgement in the

the 7 Ed. 3. here mentioned by *Litteton*. The Law accounteth the beginning of the 40 daies after the King enreth in to the Forrein Nation, for then the Warre beginneth, &c. *Vide, &c.*

The knowledge of the Law is like a deep Well, out of which each man draweth according to the strength of his own understanding. And as the Bucket in the depth is easily drawn to the uppermost part of the water (for *nullum elementum in suo proprio loco est grave*) but take it from the water, it cannot be drawn up but with great difficulty; for albeit the beginnings of this study seem difficult, yet when the Professor of the Law can dive into the depth, it is delightfull, easie, and without any heavy burthen, so long as he keep himself in his own proper element. *Iusticiari de banco, &c. Communia placita non sequantur Cur' nostram sed teneantur in aliquo certo loco. Mag. Charta.*

He which demurreth in law, *Moratur*, or *Demoratur in lege*. Matters in Law are decided by the Judges, and matters in fact by Juries. Now as there is no issue upon the fact, but when it is joined between the parties; so there is no Demurre in law, but when it is joyned, &c. *Vide & quere, fol. 71. b. & King joyned is an issue in law. f. 287.*

In some cases a man shall alledge special matter, and conclude with a Demurre; as in an action of Trespas brought by *I. S.* for the taking of his Horse, the defendant pleads that he himself was possessed of the Horse, untill he was by one *I. S.* dispossessed, who gave him to the Plaintiff, &c. the Plaintiff saith, that *I. S.* named in the Barre, and *J. S.* the Plaintiffe, were all one person and not diverse; and to the Plea pleaded by the Defendant in the manner, he demurres in law, and the Court did hold the Plea and Demurrer good, for without the matter alledged he could not demurre. Now as there may be a demurre upon Counts and Pleas, so there may be of Aid, Prior, Voucher, Resceit, Waging of Law, &c. There is a generall Demurre, that is, shewing no cause; and a speciall Demurre, which sheweth the cause of his Demurrer. Also there is a Demurre upon pleading,

pleading, &c. and there is alſo a Demurre upon Evidence, *Vide Lib. fol. 72. a.*

*Seſſ. 97, 98. and 99.*

No eſcuage was aſſeſſed by Parliament ſince the eighth year of the reign of *Edm. 2. fol. 72. b.*

*Quemadmodum incertitudo ſcutagii facit ſervitium militare, ita certitudo ſcutagii facit ſocagium.*

Si home parle generalement deſcuage, il ſer. entend' &c. deſcuage noncertaine que eſt ſervice de Chivaler, & tiel eſcuage trait, a luy homage, & fealty, car fealty eſt incident a cheſc' maner de ſervice forſq; a le tenant in Frankalmoigne. Verba equivoca & in dubio poſita intelliguntur in digniori & potentiori ſenſu.

Tenure in capite ex vi termini, is a Tenure in Groſs, and it may be holden of a ſubject, but being ſpoken generally, it is *ſecundum excellentiam*, intended of the King, for he is *caput reipublicæ*, *fol. 73. a.* Eſcuage can be aſſeſſed only by Parliament, and not by the King.

*Seſſ. 101.*

Les ſeigneurs poient diſtrein per Eſcuage aſſeſſ. per Parliament, ou ils en aſc' caſes purront au. breve le roy direct' as viconts de in les counties, &c. de levier tiel Eſcuage per eux, *Vide de Regiſt.*

Writs are the foundations whereupon the whole Law doth depend. *Fitzherbert* in his Preface to his *Nat. Br.*

Breve ſicut regula juris rem quæ eſt breviter enarrat, non tamen ita breve eſſe debeat quin rationem & vim intentionis contineat. *Braſſ. lib. 5. fo. 413, &c.*

Of Writs ſome be Original, and ſome be Judicial.

Alſo of Originals, *Quædam ſunt formata ſub ſuis caſibus & de curſu, & de communi conſilio totius regni conceſſa & approbata, quæ quidem nullatenus mutari poterint abſq; conſenſu & voluntate eorum; & quædam ſunt Magiſtralia & sæpe variantur ſecundum varietatem caſuum, factorum & quærelarum* As Actions upon the Caſe, which vary, &c.

Item



Item brevium originalium, alia sunt realia, alia personalia, alia mixta. Item, &c. alia sunt patentia sive aperta, & alia clausa.

Certain it is that the Original Writs are so artificially and briefly compiled, as there is nothing redundant or wanting in them; of which one said, That it was impossible to comprehend so much matter, so perspicuously, in fewer words.

Brevia judicialia sæpius variantur secundum varietatem placitorum proponentis & respondentis.

*Sect. 102.*

Mareschallus exercitus, in Saxon *Mariscbalk*, i.e. equitum Magister. *Marshal* is either derived of *Mars*, or of *Marc* an horse, which signifieth in the Saxon tongue a Master or Governor.

I reade of six kindes of Certificates allowed for Tryals by the Common Law: The first whereof *Littleton* speaketh, in time of War out of the Realm by the Marshal, &c. 2. In time of Peace out of the Realm. As if it be alleaged in avoidance of an Outlawry, That the Defendant was in Prison at *Bourdeaux*, &c. it shall be tryed by the Certificate of the Mayor, &c. 2 *E.4.1.b.* 4 *E.4.10.* 3. For matters within the Realm, 5 *E.4.30.* the Custom of *London* shall be certified by the Mayor and Aldermen by the mouth of the Recorder. 4. By Certificate of the Sheriff upon a Writ to him directed, 10 *H.10.* in case of Priviledge, if one be a Citizen or a Forreiner. 5. Tryal of Records by Certificate of the Judges in whose custody they are by Law. All these be in Temporal causes. 6. In causes Ecclesiastical, as loyalty in Marriage, general Bastardy, Excommengment, Profession, &c. which are to be tried by the Certificate of the Ordinary.

Also if a Subject of the King be killed by another of his Subjects out of *England*, in any Forreign Country, the wife, or he that is heir of the dead, may have an Appeal for this Murther or Homicide before the Constable and the Marshal, whose

whose sentence is upon the Testimony of Witnesses or Com-  
bare, fo. 74. a. vide lib. Stat. 1 H. 4. cap. 14. 13 H. 4. fol. 5. &c.  
Anno 25 El. &c.

## CHAP. IV.

### Knights service.

Sect. 103.

**T**eneur per homage, fealty & escuage est a tener per  
service de Chivaler, & trait a luy gard, mariage &  
reliefe.

Si hæreditas teneatur per servitium militare, tunc per  
leges infans ipse, & hæreditas ejus, &c. per dominum feodi  
illius custodieneur, &c. *Forsefc. ca. 44.*

Audacter quilibet facit quod se scire non diffidit.

Amongst the Lawes of *S<sup>t</sup> Edward* the Confessor, it is thus  
provided; Debent enim universi liberi homines, &c. secun-  
dum feodum suum, & sciendum tenementa sua arma habere,  
& illa semper prompta conservare ad tuitionem regni, & ser-  
vitium dominorum suorum juxta præceptum domini Regis  
explendum & peragendum, *Lambert fo. 135. a.*

And *William* the Conqueror confirmed that Law, &c.

And therefore if after the Lord hath the Wardship of the  
body and land, the Lord doth release to the Infant his right  
in the Seigniorie, or the Seigniorie descendeth to the Infant,  
he shall be out of Ward, &c. for he was in Ward in respect  
he was not able to do those services which he ought to do to  
his Lord, which now are extinct, *& cessante causa, cessat cau-  
satum, fol. 76. a.*

Regularly there be six incidents to Knights service, viz.  
Two of Honor and Submission, as Homage and Fealty, and  
four of Profit, as Escuage, Ward, Marriage and Relief.

Also there be other incidents to Knights service besides  
these

these ; as *aid per faire fixz Chivalrer*, and *aid per file marier*, &c.

Relevium is derived from Relevare ; Quia hæreditas quæ jacens fuit per antecessoris decessum, relevatur in manus hæredum, & propter factam relevationem facienda erit ab hærede quædam præstatio quæ dicitur relevium. *Bract. lib. 2. ca. 36. fo. 84.* By custome the heires of him that holdeth in Sorage may be in a word. \* By the common Law, the heir shall not be in ward, unlesse he claime as heire by discent. *Vide Libr.*

In many Cases the heire shall be in ward, albeit the Tenant died not seised, &c nor in the Homage of the Lord.

But if one levy a fine executory ( as *sur grant* and render ) to a man and his heires, and he to whom the Land is granted and rendred, before execution dieth, his heire being within age entreth, he shall not be in ward, for his ancestor was never \* tenant to the Lord. *Vide, &c.*

If the disseisie die his heire being within age, the Lord shall have the wardship of the heir of the body of the disseissee ; and if the disseisor dieth seised and his heire within age, the Lord may seise the wardship of his heire also, and of the Land also, &c. *Vide, &c.*

For the ease of the heire, and for avoiding of danger, &c. The heire for the most part ( after his full age ) sueth out a speciall livery, which containeth a beneficiall pardon, &c. *Fo. 77. a. Vide & quære.*

A common person shall have nothing in ward but that which is holden of him. But the King by his Prerogative shall not only have such Lands, &c. which the heire of his Tenant by Knights service in *Capite* holdeth of others, but such inheritances also as are not holden at all of any, as rent-charges, rent-seck, Fayres, Markets, Warrens, Annuities, &c. *Fo. 78. a. Stamf. pr. Fo. 8. \**

The Law is changed, since *Littleton* wrote in many Cases both for the marriage of the body, and for the wardship of the Lands, and a farre greater benefitt given to the Lords, then the common Law gave them, and some advantage given to the heires, which before they had not.

As

As if the Father had made an estate for life or a gift in taile of Lands holden by Knights service to his eldest Son, or other heir apparant within age, the remainder in Fee to any other, and dyed, the heir should not have been in ward, for this was out of the Stat. *Mertebridg*: But at this day the heir shall be in that case in ward for his body and a third part of his land. So if the Father had infeoffed his eldest Son within age and a stranger, and the heirs of the son, and died, the son should have been out of ward; but at this day he shall be in ward for his body, and for a third part of his moiety. *fo. 78. a Vide, &c.*

The benefits that grew to the subject by acts of Parliament, were; that Tenants in Fee simple, might devise their lands in such manner and form, &c. Also that the Father might infeoffe his eldest Sonne or other heir lineal or collaterall holden by Knights service, and two parts of the Land shall be out of ward. *Lib. 8. fo. 83. & fo. 163.*

And both the Statute of 32 and 34 H. 8. Concerning Wills and Wardships are many waies prejudiciall to the heirs: as, if Tenant by Knights service make a Feoffment in Fee to the use of his wife and heir heirs, or to the use of a younger Sonne and his heirs, or wholly for the payment of his debts. In these cases, although nothing at all of the Lands so holden descend to the heir, but he is disherited of the same, yet his body shall be in ward.

In factio quod se habet ad bonum & malum, magis de bono, quam de malo lex intendit. Lex intendit vicinum vicini facta scire. Nulla impossibilia aut inhonesta sunt presumenda, vera tamen & honesta, & possibilia. Lex semper intendit quod rationi convenit. By intendment of Law the heir is not able to do Knights service before his full age of 21. years, and therefore hath a gardian, &c.

96. A woman hath seven ages for several purposes appointed to her by Law: as, seven years for the Lord to have aid *pur file Marr.* Nine years to deserve Dower, 2. years to consent to marriage, untill 14. years to be in ward, 14. years to be out of ward, if she attained thereunto in the life of her

her ancestor; 16. years for to tender her marriage if she under the age of 14. at the death of her Ancestor, and 21. years to alienate her Lands, goods and Chattels. *Fo. 78.b. 35.H.6.40. Bract. l. 2.c. 37.*

A man also by the Law for severall purposes hath divers ages assigned unto him, *viz.* 12. years to take the oath of Allegiance in the Torn or Leet. 14. years to consent to marriage, 14. years for the heir in socage to chuse his guardian, and 14. years is also accounted his age of discretion. 15. years for the Lord to have *aid pur faire firz Chivaler*: under 21. to be in ward to the Lord by Knights service: under 14. to be in ward to guardian in socage: 14. to be out of ward of Guardian in Socage, and 21. to be out of ward of Guardian in Chivalrie, and to alien his Lands, Goods, and Chattels. 34. E. 1. St. 3. F. N. B 202.

But put case the Lord cannot have the wardship of the Land, as if the Lord before the age of 14. grant over the wardship of the body, the grantee cannot have the two years because he cannot hold over the Land, and the Lord which hath the wardship of the land only should lose the benefit of the two years because he hath the lands only and cannot tender any marriage, therefore in this cause the heir female shall enter into her land at her age of 14. years.

*Cessante causa cessat effectus; & cessante ratione legis cessat beneficium legis. Vide, &c.* 92. 384.

If the Lord tender a convenable marriage to the heir within the two years, and she marry elsewhere within those two years, the Lord shall not have the forfeiture of the marriage, for the Statute giveth the two years only to make a tender: *Lib. 6. fo. 71. Lord Darcies Case.* And if after such tender, &c. the heir female refuseth, then the Lord shall hold the Land untill her age of 21. years, and further untill he hath levied the value of her marriage. Statute of *West. 1. 31. Aß. p. 26.*

The tender of a marriage to an heir female before the age of 14. is void (*i.e.*) where the Lord may hold the Land for the said two years, for then the Statute appointeth the

time of tender ; but where the Lord cannot have the two years he may tender, &c. At any time after the age of 12. and before 14. for so he might have done at the common Law. L.6.71. *Darcy. Le Seignor. naitales 2. ans apres les 14. ans, mes lou l' beire female est dens l' age de 14. ans nient marrie al temps de Mort son Ancestor.*

*Señ. 104. and 105.*

94. The time of agreement or disagreement, when they marry *infra annos nubiles*, is for the woman at 12. or after, and for the man at 14. or after, and there need no new marriage if they so agree, but disagree they cannot before, &c. But if a man of the age of 14. marry a woman of the age of 10. at her age of 12. he may as well disagree, as she may, though he were of the age of consent ; because in contracts of Marriage either both must be bound, or equal election of disagreement given to both, and so *è converso*, if the woman be of the age of consent, and the man under.

*Dominus non maritabit minorem in custodia sua nisi semel. Fo. 79. b. Vide, &c.*

*Señ. 107. and 108.*

Per le stat. de Merton. ca. 6. nul disparagement est, mes lou celuy que est en gard ē. marie deins lage de 14. ans.

There be four kindes of disparagements. 1. *propter vitium animi.* 2. *Sanguinis.* 3. *Corporis.* 4. *propter jacturam privilegii. Vide Libr.*

Of disparagements at large, *Vide Libr. in Fo. 80. &c.*

*Magna Charta*, is, *Charta libertatum* ; *magnum in parvo.* Et magna fuit quondam magnæ reverentia *Chartæ.* Periculosum existimo quod bonorum viror. non comprobatur exemplo. Usage is a good interpreter of Laws, & non usage is an intendment that the Law will not bear it.

*Señ. 110. and 111.*

It is in the election of the Lord, whether for the single value the Lord will tender a marriage or no ; for he shall have the

the single value without any tender. *Lib. 6. fo. 70. L. Darcies Case.*

If the heir male before any tender, marieth himself within age, he shall pay but the single value of the marriage. *Fe. 82. b. Vide Libr.*

He that holdeth by Castleward, holdeth by Knights service but not by Escuage; for Escuage is due when the King maketh a voyage royall out of this Realme, and the Tenant maketh default, but Castleward is to be done within the Realm, &c. *l. 4. Luttrells Case, and l. 6. Gregories Case.*

Relief is no service, but an improvement of the service, or an incident to the service, for the which the Lord may distrein, but cannot have an action of debt; but his executors or Administrators may have an action of debt, and cannot distrein.

A Knights Fee consisteth of 20<sup>l</sup> land, and he payeth for his relief for a whole Knights Fee, the 4<sup>th</sup> part of his Fee, viz. Five pound, and so according to the rate. In some case the heir shall pay relief, when he was within age, at the time of the death of his Ancestor. The Lord upon every discent ought to have either wardship or relief. *Fo. 83. b. Vide, &c.*

And in some case one Lord of the heir of one Tenant shall have both wardship during his Minority, and relief at his full age. *Vide, lib. &c.*

*Sect. 114.*

*Nul ser. ingard de son corps a ascẽ Seignior. vivant son pier, &c. Fo. 84. a.*

Where the Lord hath a double interest in the wardship of the body, one as Lord, and another as Father; in that case the wardship by reason of nature cannot be waived, and claim made in respect of the Seigniory. *Vide lib. &c. 35. H. 6. 55. l. 7. fo. 13. Calvins Case.*

*Sect. 115. and 116.*

L' estatute de ann. 4. H. 7. ca. 17. done le Gardianship del use, & come del seisin in demesne.



Gardian en droit en chivalry est lou le Seignior. ē. seise de gard de terre & de l'heire per cause de lon Seignior. Mes ore si il grant le gard, &c. le grantee est appell gardian en fait. *Fol. 85. a. Br. i. grant. 85 Dyer 371. 381.*

If a man make a Lease for years of a villeine, this cannot be done without Deed, neither can the Lessee assign it over without Deed; because it is derived out of a Freehold that lieth in grant: but the wardship of the body is an originall Chatrell, during the Minority derived out of no Freehold, and therefore as the Law createth it without Deed, so it may be assigned over without Deed, the wardship of an Advowson cannot be granted without Deed. *Causa qua supra. Vide Divers.*

## CHAP. V.

### Socage.

#### Seet. 117.

**O**Mnium rerum ex quibus aliquid exquiritur. nihil agricultura melius, nihil uberius, nihil dulcius, nihil libero homine dignius. *Cicero lib. 1. offic.*

*Virg.* O Fortunatos nimium, sua si bona norunt  
*Lib. 1.* Agricolas, quibus ipsa procul discordibus armis  
*Georg.* Fundit humo facilem victum justissima tellus.

Nullum laborem recusant manus quæ ab aratro ad arma transferuntur, &c. Fortior autem Miles ex confragoso venit, sed ille unctus, & nitidus in primo pulvere deficit. *Seneca in Epist.*

In the Book of *Doomesday*, Land holden by Knights service was called *Taniland*, and Land holden by Socage, was called *Reveland*. *Fo. 86. a.*

Nota, that the legall signification of (*agium*) in composition termineth service or duty, as *Homagium*, the service of the

the man, &c. *Vide Libr.* a woundy mistake (*signum pro termino.*)

Ex donationibus autem feoda militaria, vel magnam serjeantiam non continentibus oritur nobis quoddam nomen generale, quod est socagium.

It is a presumption where homage is due, that the land is holden by Knights service.

*Seet.* 118. and 119.

*Home poit tener per fealty tantum, & est a tener en Socage Car chescun tenure, que nest pas in Chivalry est tenure en Socage.* Here *Littleton* speaketh of Tenures of common persons, for grand Serjeanty is not Knights service, and yet is not a Tenure in Socage, *Vide &c.* And note, That some Tenures in Socage are named *à causa*, and some and the greater part *ab effectu*

Socagium idem est quod servitium Socæ, & Soca idem est, quod caruca. s. un soke, ou un carve.

As *carucata terra*, a plough land may contain houses, mills, pasture, meadow, wood, &c. as pertaining to the plough, so under the service of the Plough, all services of tillage or husbandry are included.

Although the cause whereupon the name of Socage first grew be taken away, yet the name remains the same it hath been, and is used to distinguish this Tenure, from a Tenure by Knights service.

Nomina si perdas certè distinctio rerum perditur.

*Seet.* 120. and 121.

Escuage certain, is not *in rei veritate servit' scuti*, which is to be done by the body of a man; but it is *servitium Crumena*, of money, which is to be drawn out of the purse, and that is in effect a Tenure in Socage.

If a rent be paid for Castlegard, it is clear a Socage Tenure; but if a sum in gross or other thing be voluntarily paid or given by the tenant, and voluntarily received by the Lord in lieu of Castlegard, yet the Tenure by Knights service

Gardian en droit en chivalry est lou le Seignior.ē. seise de gard de terre & de heire per cause de lon Seigniory. Mes ore si il grant le gard, &c. le grantee est appell gardian en fait. *Fol. 85. a. Br. 1. grant. 85 Dyer 371. 381.*

If a man make a Lease for years of a villeine, this cannot be done without Deed, neither can the Lessee assign it over without Deed; because it is derived out of a Freehold that lieth in grant: but the warship of the body is an originall Chattell, during the Minority derived out of no Freehold, and therefore as the Law createth it without Deed, so it may be assigned over without Deed, the wardship of an Advowson cannot be granted without Deed. *Causa qua supra. Vide Divers.*

## CHAP. V.

### Socage.

#### sect. 117.

**O**Mnium rerum ex quibus aliquid exquiritur. nihil agricultura melius, nihil uberius, nihil dulcius, nihil libero homine dignius. *Cicero lib. 1. offic.*

*Virg.* O Fortunatos nimium, sua si bona norunt  
*Lib. 1.* Agricolas, quibus ipsa procul discordibus armis  
*Georg.* Fundit humo facilem victum justissima tellus.

Nullum laborem recusant manus quæ ab aratro ad arma transferuntur, &c. Fortior autem Miles ex confragoso venit, sed ille unctus, & nitidus in primo pulvere deficit. *Seneca in Epist.*

In the Book of *Doomesday*, Land holden by Knights service was called *Taniland*, and Land holden by Socage, was called *Reveland*. *Fo. 86. a.*

Nota, that the legall signification of (*agium*) in composition termineth service or duty, as *Homagium*, the service of the

the man, &c. *Vide Libr*, a woundy mistake (*signum pro termino*.)

Ex donationibus autem feoda militaria, vel magnam serjeantiam non continentibus oritur nobis quoddam nomen generale, quod est socagium.

It is a presumption where homage is due, that the land is holden by Knights service.

*Seçt. 118. and 119.*

*Home poit tener per fealty tantum, & est a tener en Socage Car chescun tenure, que nest pas in Chivalry est tenure en Socage.* Here *Littleton* speaketh of Tenures of common persons, for grand Serjeanty is not Knights service, and yet is not a Tenure in Socage, *Vide &c.* And note, That some Tenures in Socage are named *à causa*, and some and the greater part *ab effectu*.

Socagium idem est quod servitium Socæ, & Soca idem est, quod caruca. s. un soke, ou un carve.

As *carucata terræ*, a plough land may contain houses, mills, pasture, meadow, wood, &c. as pertaining to the plough, so under the service of the Plough, all services of tillage or husbandry are included.

Although the cause whereupon the name of Socage first grew be taken away, yet the name remains the same it hath been, and is used to distinguish this Tenure, from a Tenure by Knights service.

*Nomina si perdas certè distinctio rerum perditur.*

*Seçt. 120. and 121.*

Escuage certain, is not *in rei veritate servit' scuti*, which is to be done by the body of a man; but it is *servitium Crumena*, of money, which is to be drawn out of the purse, and that is in effect a Tenure in Socage.

If a rent be paid for Castlegard, it is clear a Socage Tenure; but if a sum in gross or other thing be voluntarily paid or given by the tenant, and voluntarily received by the Lord in lieu of Castlegard, yet the Tenure by Knights

Service remaineth, *vide lib. 4. fo. 88. in Lutterels Case.*

Rent Service is accompanied with some corporal service, as fealty at the least, *Sect. 122.*

*Sect. 123.*

If lands holden in Socage be given to a man, and the heirs of his body, and he dieth, his heir within age, the next Cousin of the part of the father, albeit he be worthier, shall not be preferred before the next Cousin of the part of the mother; but such of them as first seisseth the heir shall have his Custody, *fo. 88. a.*

If *A.* be Guardian in Socage of the body and lands of *B.* within age of 14 years. *A.* shall be Guardian *per cause de gard.* But an Infant, &c. that is not in the custody of another, cannot be *Gardian en Socage*, because no Writ of Account lieth against an Infant.

*Alium regere non potest, qui seipsum regere non novit. Brañ. lib. 2. fo. 88.*

Minor minorem custodire non debet, alios enim presumitur male regere, qui seipsum regere nescit, *Fleta lib. 1. cap. 10.*

Hæres sokmamii sub custodia capitalium dominorum non erit, sed sub custod' consanguineorum suorum propinquorum, hoc est, eorum qui conjuncti sunt jure sanguinis, & non jure successionis, ex parte quor' non descendit hæreditas, &c.

Hereby not only an immediate descent, but all possibility of descent is excluded. *Vide lib. fo. 88. b.*

The father Guardian in Socage must by law be accountable to the son, both for his marriage, and also for the profits of his lands, which he should not if he had the custody, &c. in this case as father in respect of nature.

156. And the act of the law never doth any man wrong, *sic vide diversitatem, &c.*

Guardian in Socage shall not forfeit his interest by outlawry or attainder of Felony or Treason, because he hath nothing to his own use, but to the use of the heir.

*Legitima*

*Legitima aetas*, as the Statute of *Merlebridge*, 52 H.3. speaketh; or *plena aetas*, as the Writ of Account doth render it, are to be understood *secundum subjectam materiam*, that is of the heir of Socage land, whose lawfull and full age as to Guardianship is 14 years.

And as to the recitall of the Statute, it is evident, That an action of Account did lie against Guardian in Socage at the Common Law, *Vide lib. fo. 89. a.* \*

If the Guardian receive the rents and profits, &c. and he be robbed without his default or negligence, he shall be discharged thereof. But otherwise it is of a *Carrier*, for he hath his hire, and thereby implicately undertaketh the safe delivery of the goods delivered to him. H. 38. *Elix. inter Woodlief & Curteis.*

Note, it is necessary for any that receiveth goods to be kept, to receive in this special manner, *viz.* To be kept as his own, or to keep them at the peril of the owner. To be kept, and to be safely kept, is all one in Law, *sic vide diversif. Pascha*, 43 *Elix. Southcote and Bennet.*

The *Gardian en Socage* shall account for the marriage of the heir: so for so much as any man *bona fide* had offered for the marriage unto him.

Le enfant al age de 18 years poit faire son testament, 95. &c.

*Nota*, Executors could not have an action of Account at the Common Law, in respect of the privity of the account; but the Statute of *Westm. 2. cap. 23.* hath given the action of account to Executors, the Statute of 25. E. 3. cap. 5. to Executors of Executors, and the Statute of 31 E. 3. cap. 11. to Administrators.

The *Gardian en Socage* is bounden by Law, That the heir be well brought up, and that his Evidences be safely kept.

*Seff. 124. and 125.*

*Sed quære si apres l'age de 14 ans, &c.* This quære came not out of *Littletons* quiver; for it is evident, That after the age of 14 years, *Gardian en Socage* shall be charged Bayliff at

any time when the heir will, either before his age of 21. years, or after.

Gardian en Chivalry ad le gard a son proper use, & Gardian en Socage, nad le gard a son use, mes al use del heir.

Et si Gardian en Socage devie devant asc' account fait per luy al heire, de ceo le heire en sans remedy, per ceo que nul bre, de accompt gift tenus les execut' sinon pur le roy tantsolement.

For albeit in an action of account against a Guardian in socage, &c. the defendant cannot wage his Law, yet in respect of the privity of the matters of account, and the discharge resting in the knowledge of the parties thereunto, an action of account lieth nor, &c. but that is holpen by Statute. *Vide, &c. fo. 90. b. Rot. Parl. 50. E. 3. nu. 123.*

The Kings Treasure is *Firmamentum belli, & Ornamentum pacis. Nullum tempus occurrit Regi.*

Prerogative extends to all Powers, Preheminences and Priviledges, which the Law giveth to the Crown. *Stans. Prer. 5. 10.*

*Seff. 126, & 127, 128, 129.*

Le snr. aua del heire son tenant pur reliefs, tant come le rent amount que il paya per an, ouster le rent, &c.

Of corporal service, or labour or work of the tenant, no relief is due, but where the tenant holdeth by such yearly rents or profits which may be paid or delivered.

Et le snr. poit incontinent distreine per reliefs; sinon que il soit tiel service, que nest donques an esse, sicome le tenant tient per un prose, & devie en yuer, &c.

For Flowers, that are *fructus fugaces*, cannot be kept, and therefore are not to be delivered till the time of growing; (otherwise it is of corn, &c.)

*Lex spectat naturæ ordinem, non cogit ad impossibilia, Impossibile est quod naturæ rei repugnat.*

*Seff. 130, & 131, 132.*

Il est reason que le snr & les heires ont asc' service fait a eux



eux per prou & testifier que la terre est tenus de eux, fol. 92. b.

An Escheat is a casual profit, *quod accidit domino ex eventu, & ex insperato.*

Of incidents there be two sorts, f. } Separable, as rents incident to Reversions, &c. 160.  
Inseparable, as Fealty to a Reversion or Tenure.

Where the Tenure is by Fealty only, there is no relief due, fol. 93. a. *videlib.*

Lessee per ans ferra fealty al lessor, per ceo que il tiel de luy, autrement est de tenant a volunt ; car il nad asc' sure estate.

And because the matter of an oath must be certain, therefore tenant at will shall not do fealty.

## CHAP. VI.

### Frankalmoigne.

Sect. 133.

OF Ecclesiastical persons some be } Regular, and they live under certain Rules, and have vowed three things ; True Obedience, perpetual Chastity, and Wilfull Poverry.  
Secular, as Bishops, Deans and Chapters, Archdeacons, Prebends, Parsons, Vicars, &c.

All Ecclesiastical persons may hold in Frankalmoigne be they Secular or Regular ; but no Lay person, &c.

By the ancient Common Law of England, a man could not alien such lands as he had by descent, without the consent of his heir ; yet he might give a part to God in Freealmoigne, or with his daughter in free marriage, or to his servant

servant in remuneratione servitii, fol. 94. b. Glanville l. 7. cap. 1. fo. 44, 45. acc.

Lands must be given to a Corporation aggregate of many by deed, and they have a Fee simple without these words (*Successors*) for the body never dies.

Otherwise is it of a sole Corporation. But yet out of the general rules the case of Frankalmoigne is excepted. And there is a diversity, when the head and body both are capable, as Dean and Chapter; and when one, as in case of Abbot or Prior and Covent.

Ancient Grants shall be allowed, as the Law was taken when such Grants were made.

Sect. 134.

*Decanus* is derived of *Decem*, which signifieth Ten, for that he is an Ecclesiastical secular Governour, and was anciently over ten Prebends or Canons at the least in a Cathedral Church, and is head of his Chapter. *Capitulum est Clericorum congregatio sub uno Decano in Ecclesia Cathedrali.* And Chapters be twofold, viz. the Ancient, and the Later. The ancient Deans come in, in much like sort as Bishops do; for 378. they are chosen by the Chapter, by a *Conge de eslier*, as Bishops be, and the King giving his Royal assent, they are confirmed by the Bishop; but they which are either newly translated, or founded, are Donative, and by the Kings Letters Patents are installed, fo. 95. a.

Ecclesiastical persons have not capacity to take in Succession, unless they be bodies Politique, as Bishops, Archdeacons, Deans, Parsons, Vicars, &c. or lawfully incorporate by the Kings Letters Patents, or Prescription.

Sect. 135.

Of Tenures, some be Spiritual, and some be Temporal; and of Spiritual, some be incertain, as Tenures in Frankalmoigne, and some be certain, as Tenures by Divine service. | Again, Divine service is twofold, either Spiritual, as Prayers to God; or Temporal, as distribution of Alms to poor people. Since

Since *Littleton* wrote, the Book of Common Prayer, &c. is altered; yet the Tenure in Frankalmoigne remaineth, and such Prayers and Divine service shall be said and celebrated, as now is authorized: for the change is by generall consent &c. of Parliament, 2 E. 6. c. 1. 5. & 6. c. 1. 1 E. 6. c. 2. whereunto every man is party.

And as *Littleton* hath said before in the case of Soccage, Sect. 119. The changing of one kinde of Temporal services into other Temporal services, altereth neither the name nor the effect of the Tenure: so the changing of Spiritual services, &c. altereth neither the name, &c.

*Frankalmoigne est le plus haute service.*

— fuit hæc sapientia quondam

*Publica privatis secernere, sacra profanis.*

Tant solemne divine & spiritual service en destr. fait per terres &c. tenus en Frankalmoigne.

Sect. 136. and 137.

No distress can be taken for any services that are not put into certainty, nor can be reduced into any certainty.

*Oportet quod certa res deducatur in iudicium.*

And yet in some cases there may be a certainty in uncertainty: as a man may hold of his Lord to shear all the sheep depasturing within his Manor; and the Lord may distrain for this uncertainty, 7 E. 3. 38.

Ordinarius, so called, *Quia habet ordinariam jurisdictionem* 379. *in jure proprio, & non per deputationem*; as a Bishop, &c.

Where the right is Spiritual, and the remedy thereof one-ly by the Ecclesiastical Law, the consuans thereof doth appertain to the Ecclesiastical Court, fo. 96. a.

And so where the Common or Statute Law giveth remedy *in foro seculari* (whether the matter be spiritual or temporal) the consufance of that cause belongeth to the Kings Temporal Courts only, &c. fo. 96. b.

There were within this Realm 118 Monasteries founded by the Kings of England. \ So all Bishops, &c. which hold of the King by Barony, and are Lords of Parliament, called

called by Writ, &c. Ante fol. 83. & 69.

Sect. 138. and 139.

*Nihil quod est inconueniens, est licitum*, fol. 97. b.

It is better, saith the Law, to suffer a mischief (that is peculiar to one) then an inconvenience that may prejudice many, 42 Ed. 3. 5. 28 E. 3. 395. 20 H. 6. 28.

There is no Land that is not holden of some Lord or other, by some service Spiritual or Temporal.

*Nihil quod est contra rationem est licitum*. For Reason is the life of the Law; nay, the Common Law it self is nothing else but Reason, which is to be understood of an artificial perfection of Reason, gotten by long study, observation and experience, and not of every mans natural Reason: for, *Nemo nascitur artifex*.

*Neminem oportet esse sapientiores legibus*.

Si un Abbot, &c. alien his lands holden in Frankalmoigne to a secular man in fee simple; In this case, albeit the Alienor held not by fealty nor any other terrene service, but only by Spiritual services, and those incertain, yet the Aliance shall hold by the certain service of fealty, fol. 98. a.

Sect. 140.

Il est ordeigne per lestatut Quia empt. terrum fait 18 Ed. 1. que nul poit alien, ne grant terres, &c. en fee simple a ten de luy mesme.

*Alienatio, licet prohibeatur, consensu tamen omnium in quorum favorem prohibita est, potest fieri, & quilibet potest renunciare juri pro se introducto.*

*Præsumitur rex habere omnia jura in scrinio pectoris sui. Dispensatio est mali prohibiti provida relaxatio, utilitate seu necessitate pensata, vide libr. & quære, fo. 99. a.*

By Prescription the successor of an Abbot may pay relief.

Sect. 141.

Nul poit tenure terres &c. en frankalm. forspise del grantor on de

*de ses heires.* Here (or) hath the sense of (and) &c. For the heir cannot take any thing in the life of the ancestor, neither can the heir take any thing by descent, when the ancestor himself is seclused. *Vide, &c.* As a man cannot grant lands in Taile and reserve a rent to his heirs. 15.E.4.

The tenure in *frankalmoigne* is an incident to the inheritable blood of the grantor, and cannot be transferred or forfeited to any other. But it is not an incident inseparable, &c. For the Lord may release to the Tenant in *frankalmoigne* and then the tenure is extinct, and he shall hold of the Lord Paramount by Fealty. As in *Littl. S.* 139. And if the Seigniorie be transferred by act in Law to a stranger, thereby the privity is altered, and the tenure changed. *Fo. 99. b.*

And a Bishop with assent of his Chapter, &c. may give Lands in *Frankalmoigne*, to hold of them and their successors, by licence, &c. Alwaies the Seigniorie nearer to the Land, drowns the Seigniorie that is more remote, &c.

Sect. 142.

*L mesne est tenu de acquiter son Tenant en frankal. de Chef* manner de service, que asc' Seignior. Paramount de luy void demand. He is also to acquitt. him of improvement of services, as if he be distrained for relief, *aid per file mar.* &c. Also for suit service to a hundred; but for suit reall in respect of resistance within any hundred, &c. it is otherwise. There be three kindes of Acquittals. 1. An acquittal by Deed. 2. An acquittal by prescription. 3. An acquittal by tenure; and that is four manner of waies. 1. By owelty of service, for service acquites service. 2. Tenure in *Frankalm.* 3. Tenure in *Frankmar.* 4. Tenure by reason of Dower. *F. N. B.* 135. &c. ( There be six Writs in Law maintainable before any molestation, &c. As 1. A man may have his Writ of Mesne before he be distreined. 2. A Warr. Carta, before he be impleaded. 3. A Monstraver. before any distresse or vexation. 4. An Aud. quer. before any execution sued. 5. A Curia claudend. before any default of inclosure. 6. A ne-in-  
juste

juste vexes, before any distresse or molestation : and these be called, *brevia anticipantia*.

*Nota*, the Plaintiff in a Writ of Mesne, may chuse either processe at the common Law, or upon the Statute of *West. 2.* And upon processe given by the said Statute, viz. Summons, Attachment, and grand distresse, if the Mesne cometh not, he shall be fore-judged : and the judgement is, *quod T. (le mesne) amittat servitium de A. (le Tenant) de tenementis predictis, & quod omisso predicto T. prafut. R. (le Seignior Paramount) modo sit attendens & respond. per eadem servit. per quae T. tenuit.* Also if the Tenant be not acquitted, after he hath recovered in a Writ of Mesne, he shall have a Writ of *Distingas ad acquietand.* Fo. 100. *Vide, &c. F. N. B. 138.*

If two joyntenants bring a Writ of Mesne, and the one is summon'd and levered, the other cannot fore-judge the Mesne, for he ought to be attendant to the Lord Paramount, as the Mesne was, and that cannot he be alone. And so if there be two joyntenants Mesnes, and in a Writ of Mesne, brought against them, one maketh default, and the other appears, there can be no fore-judger. *Vide Libr. & quare.* If the Daughter, the Son being in *venter sa mere*, before judged, it shall binde the Son that is born afterwards ; for he had no right at the time of fore-judgement.

## CHAP. VII.

### Homage Auncestrel.

*Seff. 143. &c.*

**H**OM. Aunc. est loz un tenant tient sa terre de S<sup>o</sup> Seig<sup>r</sup>. per Homage, & m. le tenant & ses Aucestors que heire il est ont tenus m. la terre del dit Seignior & de ses aucestors, &c. de temps dont memorie ne court, per homage, & ont fit.

a euz

a eux homage. Tiel Seignior doit garrant. son tenant queunt il é implede de la terre, &c.

Auxi'il doit acquiter le tenant envers tous Seigniors *Paramount* luy de chesi manner de service. Mes si le Seignior navoit recieve pas homage del tenant, &c. Nede asc' de ses ancestors il poit disclaime en le tenancy quánt il est vouch, & issint oust le tenant de son garrantie.

*Señ. 145.*

Est tanta & talis connexio per homagium inter dominum & tenentem, quod tantum debet dominus tenenti, quantum tenens domino, præter solam reverentiam. *Bract. Fo. 78. Glan. li. 9. ca. 4. & Brit. Fo. 170. a.*

Ancient continued inheritance on both parties hath more priviledge and account in Law, then inheritances lately or within memorie acquired. *Fol. 101. a.*

*Warrantus*, vouchee is either to defend the right against the demandant, or to yeeld him other Land, &c. in value, and extendeth to Lands, &c. of an estate of Freehold, or inheritance: and not to any Chattell real, personall, or mixt, saving only in case of a wardship granted with warrant; for in the other cases concerning Chartels, &c. The voucher shall have his action of Covenant, if he hath a Deed, or if it be by parol, then an action upon his Case, or an action of deceit, &c.

The proces whereby the vouchee is called is a *Summon. ad Warr.* whereupon if the Sheriff return that the vouchee is summoned and he maketh default. *Mag. Cape ad valentiam* is awarded, when if he make default again, then judgement is given against the Tenant, and he over to have in value against the vouchee. But if the Sheriff return that he hath nothing, then after Writs of *Alias*, and *pluries*, a Writ of *sequatur sub suo periculo* shall be awarded, &c. and the demandant shall not have judgement to recover in value, because the vouchee was never warned. *Vide Libr. Fo. 101. b.*

When the tenant being impleaded within a particular jurisdiction (as in *London*, &c.) Voucheth one to warr. and prayes that he may be summoned in some other County  
out



out of the jurisdiction of that Court: this is called a forrain voucher. By the Civil Law every man is bound to warrant the thing, that he selleth or conveyeth, albeit there be no expresse warranty, but the Common Law bindeth him not, unlesse there be a warranty either in Deed, or in Law, for, Caveat emptor, &c.

There be three kindes of disclaimer, *i. e.* in the Tenancy; in the blood, and in the Seignior. *F.N.B.* 197. & 151.b.

In the case of Homage Auncestral (which is a special warranty in Law, by the authority of *Littleton*) the Lands generally that the Lord hath at the time of the voucher, shall be liable to execution in value, whether he hath them by descent or purchase. But in the case of an expresse warranty the heir shall be charged but only for such Lands as he hath descent from the Auncestral which created the warranty. *F.N.B.* 152.

And note, the Lands of the vouchee shall be liable to the warranty, that the vouchee hath at the time of the voucher; for that the voucher is in lieu of an action, and in a *Warr. Carta*, the Land which the defendant hath at the time of the Writ brought shall be liable to the warranty. *Fo.* 102.a.

Upon a judgement in debt, the Plaintiff shall not have execution, but only of that Land which the Defendant had at the time of the judgement, for that the action was brought in respect of the person, and not in respect of the Land. *Vide Lib. &c.*

If a man give Lands in Fee with warranty, and binde certain Lands specially to warranty, the person of the Feoffor is hereby bound, and not the land, unlesse he hath it at the time of the voucher. 32.E.1. voucher 292.

*sect.* 146.

En Chesc' case lou le Seignior poit disclaymer, &c. Et de ceo poit disclaimer en Court de Record, son Seigniorie ẽ extinct & le rerant tiendra del Seignior procheine Paramount, &c.

Meliorẽ conditionẽ Ecclesiæ suæ facere potẽ prælatus

rus deteriorem nequaquam ; and again, Ecclesiæ suæ condici-  
melior. facere possunt sine consensu, deteriorem non possunt  
sine consensu.

Expedit reipublicæ ut sit finis litium, *vide fol. 103. a.*

If an action of Debt upon an Obligation against an Ab-  
bot, the Abbot acknowledgeth the action, and dieth, the  
successor shall not avoid Execution, though the Obligation  
was made without the assent of the Covent, for he cannot  
falsifie the Recovery in an higher action. *Et res judicata pro  
veritate accipitur* ; and this is but a Chattel, 7 Reg. 2. tit  
Abbot 7.

*Señ. 147, and 148.*

If the tenant make a feoffment in fee upon condition, and  
dieth, his heir performeth the condition, and re-entreteth,  
the *Homage ancestrel* is destroyed in respect of the interrup-  
tion of the continuance of the privity and estate, 1. *Mich.*  
14, & 15 *El.*

Tenant que fist homage al pere, ne ferre homage al fits, *fo.*  
103. b. *vide le except. a ce rule.*

*Señ. 149, 150, & c.*

*Fealty est incident a chesc' atturment del tenant* <sup>quant</sup> *grant le seig-*  
*niory est grant* None shall do homage but the tenant of the  
Land, to the Lords of whom it is holden, *fol. 104. a. 8 Ed. 4.*  
27. b. \*

The recovery of the seigniory differeth from the aliena-  
tion of the Lord, which is his own act, or the descent of the  
seigniory to the heir, which is an act in law ; for that by the  
Recovery, the state of him that received the homage is defea-  
ted, for it shall not lie in the mouth of the tenant, to falsifie  
the recovery which was against his Lord, &c. for that the  
tenant had nothing therein, &c.

If a man had made a Lease for years to begin at Michael-  
mas, reserved a rent, and he had suffered a Common Reco-  
very before Michaelmas, the Recoverer should distrain for  
rent, which the lessor before the recovery could not, 28 H. 8.  
*Dyer 41. fol. 104. b.*

The tenant ought to seek the Lord to do him homage, &c. for this service is personal, &c. but rent may be paid and received by other; and therefore a tender of the rent upon the land is sufficient, fo. 105.a.

## CHAP. VIII.

### Grand Sergeanty.

Sect. 153.

**G**Rand Sergeanty, est lou home tient ses terres del Roy per les services que il doit faire en son proper person, com de port. le banner del Roy, our sa lance, &c.

Ceo tenure en ten. per service de Chivalry; mes le livery païam al Roy pur reliefe, le value (ouster les charges & reprises) des terres pur an S. 154, & 158.

Magna Sergeanty; i. e. *Magna Servitium*: because it is greater and more worthy than Knight service; for this is *Revera servitium Regale*, and not *Militare*, onely.

This Tenure hath seven special properties: 1. To be holden of the King onely. 2. It must be done when the tenant is able in proper person. 3. This service is certain and particular. 4. The Relief due, &c. differeth from Knights service. 5. It is to be done within the Realm. 6. It is subject to neither *Aid pur faire fits Chivaler*, or *file mariage*. And 7. it payeth no Escuage, fo. 105.b. 11 H. 4. 34. F.N. B. 83.

There were divers Lords Marshals of England before the reign of R. 2. yet King R. 2. created *Tho. Moubrey* Duke of Norfolk, and first Earl Marshal of England, per nomen *Comitis Marischalli Angliae*. in Rot. pat. 20. R. 2.

*Thesaurus Regis respicit Regem & Regnum; And Censur Regis est anima reipub.* fol. 106.a. Dyer 4 El. 213.

Where the Grand Sergeanty is to be done to the Royal person

person of the King, or to execute one of those high and great Offices, there his tenant cannot make a Deputy without the Kings license, &c. But he that holdeth to serve him in his War within the Realm, or by Cornage, may make a Deputy, fol. 107. a. *vide libr. &c. qu.*

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## CHAP. IX.

*Petit Sergeanty.*

Sect. 159.

**P**etit Serjeanty est lou home tient, &c. del Roy, de rend. al Roy annualment un arke, ou un Espece, &c. petit choses touchant le guerre. Et tiel service ne fors q; Socage en effect.

If one holdeth Land of a common person in gross as of his person, and not of any Manor, &c. and this Seigniorie escheateth to the King (yea though it be by Attainder of Treason) he holdeth of the person of the King, and not *in Capite*, because the original Tenure was not created by the King. And therefore it is directly said, That a Tenure of the King *in Capite*, is when the Land is not holden of the King, as of any Manor, Castle, Honor, &c. but of his Crown.

*Nota.* A man may hold of the King *in Capite*, or of his Crown, as well in Socage, as by Knights service, fol. 191. 4.

## C H A P. X.

*Tenure en Burgage.*

Sect. 162.

**E**St lou les tenants deins le Burgh sont tenus del seigneur del Burgh per cert' rent, &c. & tiel tenure ne fors q; tenure en Socage.

Burgh is an ancient Town holden of the King or any other Lord, which sendeth Burgeses to the Parliament, *fo. 109. a. l. 10. 123. Major de Lynns C.*

A City is a Borough incorporate, which hath, or (within time of memory) have had a Bishop: and though the Bishoprick be dissolved, yet the City remaineth; as *Westminster. Cambridge* an ancient City, *Mich. 7. R. 1. Rot. 1. vide libr. fo. 109. b.*

Cities were instituted for three purposes: 1. For conservation of Laws, whereby every man enjoyeth his own in peace. 2. For tuition and defence of the Kings Subjects, and for keeping the Kings peace in time of sudden uproar. And 3. For defence of the Realm against outward and inward hostility.

There is *lex & consuetudo Parliamenti, quæ quidem lex querenda est ab omnibus, ignorata à multis, & cognita à paucis.* Of the Members of this Court of Parliament, some be by descent, as ancient Noblemen; some by creation, as Nobles newly created; some by succession, as Bishops; some by election, as Knights, Citizens, and Burgeses, *fol. 110. a. ante Sect. 3.*

The Jurisdiction of this Court is so transcendent, that it maketh, enlargeth, diminisheth, abrogateth, repealeth and reviveth Laws, Statutes, Acts and Ordinances, concerning matters Ecclesiastical, Capital, Criminal, Common, Civil, Marrial, Maritime, &c. None can begin, continue

or

or dissolve the Parliament but by the Kings Authority.

Of this Court it is said, Que il enim de tresgrand honor & justice, de que nul doit imaginer chose dishonorable.

Haber Rex Cur' suam in Concilio suo in Parliamentis suis præsentibus Prælati, Comitibus, Baronibus, Proceribus, & aliis viris peritis, ubi terminatæ sunt dubitationes judiciorum, & novis injuriis emerfis nova constituuntur remedia, & unicuiq; justitia prout meruerit retribuetur, *Pl.c. 398.b.d. Pet.St.c. 55. fo. 164. Flet.l. 2.c. 2.*

The King of *England* is armed with divers Counsels; as first, *Commune Concilium*, and that is the Court of Parliament. 2. *Magnum Concilium*, and this is sometime applied to the Upper House of Parliament, and sometime out of Parliament time to the Peers of the Realm. 3. The Privy Council. And 4. the Kings Council for Law matters, and they are his Judges of the Law.

*Señ. 165, &c.*

Alcun Burghs ont tiel Custome, que le puisne fits inherita, &c. Consuetudo quandoq; pro lege servatur, in paribus ubi fuerit more utentium approbata, & vicem legis obtinet, longævi enim temporis usus & consuetudinis non vilis autoritas. Longa possessio (sicut jus) parit jus possidendi, & tollit actionem vero domino. *Bracton.*

Of every Custom there be two essential parts; Time out of minde, and Continuance and peaceable usage without lawfull interruption.

If Lands be within a Manor, Fee, or Seignicry, the same by the Custom of the Manor, &c. May be devisable; or of the nature of Gavelkinde, or of Borough English. 21. *Ed. 4. 53. 54.* otherwise is it. In an upland Town, &c.

*Nota*, That in special Cases a Custome may be alleaged within a Hamlet, a Town, a Burgh, a City, a Manor, an Honour, an Hundred, and a County: but a Custom cannot be alleaged generally within the Realm, &c. For that is the Common Law. *Fo. 110.b. F.N.B. 122. Dyer 54.* By some Customes the youngest brother shall inherit.

Sect. 166. and 167.

*Item en asc' Burghs per le oustom. feme avera pur sa Dower tous les teñement que feront a sa baron, &c.* And this called Franke Banke. Here is imployed by (&c.) that in some places the Wife shall have the moiety of her Husbands Lands, so long as she lives unmarried, as in Gavelkind. And of Lands in Gavelkind a man shall be Tenant by the Curtesie, without having of any issue.

22.

In some places the Widdow shall have the whole, or halfe, *Dum sola & casta vixerit, &c.* F.N.B. 150.

355.

*Item, home poit deviser ses terres qui il ad en Fee simple, deins mesme le Burgh, &c.* A devisor per son Testam. is to speake by his Testament, what his mind is to have done after his decease. *Testamentum est duplex, 1. In Scriptis. 2. Nuncupatum, seu sine scriptis.* The devisee, cannot take goods, &c. without the assent of the Executors; otherwise it is of Lands devised by Custome. *for they cannot not be devised*

If a man hath Lands holden by Knights service in Capite, and lands in Socage, he can devise but two parts of the whole; But if he hold lands by Knight-service of the King, and not in Capite, or of a meane Lord, and hath also Lands in Socage he may devise two parts of his Land holden by Knights service and all his Socage Lands. *Vide lib. & quere. Fo. 111.b.*

294.

If a man make a Feoffment in Fee of his Lands holden by Knights service to the use of such person and persons, and of such Estate and estates, &c. As he shall appoint by his Will, in this case by operation of Law, the use and State vests in the Feoffor, and he is seised of a qualified Fee. In this Case if the Feoffor limit Estates by his will, by force and according to his power, where the use and the Estates growing out of the Feoffment are good for the whole, and the last will is but directory. *Vide Lib. &c.*

If a gift in Taile, or a Lease for life be made the remainder in Fee, this remainder is not within the Statute.

Sect. 168. Fo. 112.

By no conveyance at the Common Law a man could during



ring the Coverture either in possession, reversion or remainder limit an estate to his Wife. <sup>for the husband may by his Deed</sup> But a man may by his Deed Covenant with others to stand seised to the use of his wife, or make a Feoffment, &c. to the use of his Wife, and now the state is executed to such uses by the Statute of 27 H.8. for an use is but a trust and confidence, which by such a meane might be limited, by the husband to the wife,

*Omnia quæ sunt uxoris sunt ipsius viri, non habet uxor potestatem sui sed vir. Braët. lib. 2. ca. 15.*

*Vir & uxor sunt quasi unica persona quia caro una, & sanguis unus, res licet sit propria uxoris, vir tamen ejus custos, cum sit caput mulieris. Braët. 5. traët. 5. ca. 25. al. 2. Baron. 10 H. 720. Ex-  
trix del cē que use, poit vend. terres devisi.*

*In contractibus benigna, in testamentis benignior, in restitutionibus benignissima interpretatio facienda est voluntas testatoris est ambulatoria usque ad mortem.*

The first grant and the last will is of greatest force.

*Cum duo inter se pugnantiæ reperiuntur in testamento ultimum ratum est.* If a feme covert be seised of Lands in Fee, she cannot devise the same to her husband ; because she is *sub potestate viri, &c.*

Seët. 169. of 113.

*Item per tiel custome home poit deviser per sen testamentum que les executors point aliewr les tenements in Fee, &c. pur cert. sum. de mony a distribut. pur son alme, & issint. poies veir icy un case ou home poit faire loial estate. & encore il navoit riens en les tenements al temps del estate ft. quia consuetudo ex certa causa rationabili usitata, privat communem legem.* Here it appeareth that the Executors having but a power, as Littl. putterh the Case, <sup>63.</sup> to sell, they must all join in the sale. Fo. 112. b. *Vide, &c.* <sup>185.</sup>  
Dyer 177.

But if a man deviseth Lands to his executors to be sold and maketh two Executors and the one dieth, yet the survivor may sell the Land, because as the state, so the Trust shall survive ; and so note a diversity between a bare trust, and a trust coupled with an interest. 39. Ass. p. 17. Dyer 210. and 371.

By the Statute of 21 H. 8. it is provided that where Lands are willed to be sold by Executors, that though part of them refuse, yet the residue may sell. *Lib. 1. 173.*

Mine advise to them that make such devise by will is, to make it as certaine as they can, as that the sale be made by his Executors or the survivors or survivor of them, if his meaning be so, or by such, or so many of them as take upon them the probate of his will, &c. And it is better to give them an authority then an estate, unlesse his meaning be they should take the profits of his Lands in the mean time, and then it is necessary that he deviseth, that the mean profits till the sale shall be assents in their hands, for otherwise they shall not be so. *Vide lib. (fo. 113.) Stat. 32. H. 8. c. 2. 34. H. 8. cap. 5.*

*Consuetudo prescripta & legitima vincet legem.* But no Custom or prescription can take away the force of an Act of Parliament. *Prescriptio est titulus ex usu & tempore substantiam capiens ab autoritate legis,* A title taking his substance of use and time allowed by the Law. 12 E. 4. 1. 2 M. Br. pr. 100. 6 E. 6. Dy. 31. 45. Aff. 8.

Señ. 170.

I. S. Seised of the Manor of D. in Fee prescribeth thus : that I. S. his ancestors, and all those whose estate he hath in the said Manor, have time out of mind of man had and used to have common of pasture, &c. in such a place, &c. Being the Land of some other, &c. as pertaining to the said Manor. A Custome, is in this manner : A. Copyholder of the Manor of D. doth plead, &c. that all the Copyholders, &c. have had and used to have common of pasture, &c. in such a wast of the Lord, parcell of the said Manor. | But both to customs and prescriptions these two things are incident inseparable, viz. possession, or usage: and time : Possession must have 3 qualities, it must be long, continuall, and peaceable. S. 170.

Note, 1. To what things a man may make a title by prescription without Charter ; and 2. How it may be lost by interruption.

interruption. / For the first, as to Franchises and liberties as cannot be seised as forfeited, before the cause of forfeiture appear of Record, no man can make a title by prescription, &c. as to the goods and Chattels of Felons, &c. to make a Coroner, &c. *l. 5. 109. l. 9. 29.*

But to treasure trove, waives, estranges, &c. to hold Pleas, &c. A man may make a title by usage onely, &c. Without any matter of Record (*Fo. 114. 6.*) *9 H. 7. 11. 20.*

And for the second, it is to be known that the title being once gained by prescription or custome, cannot be lost by the interruption of the possession, for 10 or 20 yeares, but by interruption in the right, as if a man have had a rent or common by prescription, unity of possession of as high and perdurable estate is an interruption in the right. *Vide, &c. (Fo. 114. b.)*

*A Modus decimandi* was alledged, *Mich. 42. and 44 Eliq. in banco Reg.* by prescription time out of minde for tythes of Lambes, and thereupon issue joined, and the Jury found that before 20 years then last past there was such a prescription, and that for this 20 years he had paid the Lambes in specie; and it was objected first, that the issue was found against the plaintiff, for the prescription was generall, for all the time of prescription, and 20 years fail thereof. 2. That the party by payment of tythes in specie had waived the prescription or custome. / But it was adjudged for the plaintiff in the prohibition, for albeit the *modus decim.* had not been paid by the space of 20 years, yet the prescription being found, the substance of the issue is found for the plaintiff. *Vide Lib. &c. M. 43. and 44 Eliq. B. R. Nowell and Hicks.*

Note, all the prescriptions that were limited from a certaine time, were by Act of Parliament, as from the time of *H. 1.* After that, from the time of *H. 2.* By the Statute of *Merton*; and from the time of *R. 2.* By the Statute of *Westm. 1.* But the prescription of time out of memory of man, was at the Common Law, and limited no time. Memory or knowledge is twofold. First, by knowledge, by proof, as by Record,

cord, or sufficient matter of writing. 2. by his own proper knowledge. 28. *Aff.* 25. 11 *H.* 7. 21. *Dy.* 273.

295. There is a diversity between an Act of Parliament in the Negative, and in the Affirmative: for an Affirmative Act doth not take away a custome, as the Statute of Wills of 32. and 34 *H.* 8. Do not take away a custom to devise Lands, &c. Also there is a diversity between Statutes that be in the Negative: for if a Statute in the Negative be declarative of the Ancient Law, that is in Affirmative of the common Law, there as well as a man may prescribe, &c. Against the common Law, so a man may do against such a Statute. *Fo.* 115. a. *Vide & qu. M. Carta.* c. 35.

None shall cut down any trees of his own within a forest, without view of the Forrester. Statute 34 *E.* 1. 4. Forrester. *Rast.* But a man may prescribe to cut down his woods, &c. 16 *El.* in *le Escheq.*

The common Law appeareth in the Statute of *Mag. Cart.* and other ancient Statutes: (which for the most part are Affirmative of the Common Law) in originall writs, in judiciall Records, and in our books of termes and yeares. Acts of Parliament appear in the Rolls of Parliament, and for the most part are in Print. / Particular customes are to be proved. *Fo.* 115. b.

*Señ.* 171.

Every City is a Burgh, but every Burgh is not a City. And it appeareth by *Littleton*, that a Town is the *Genus*, and a Borough is the *Species*, for he saith that every Borough is a Town, but every Town is not a Borough. *Et sub appellatione villarum continentur Burgi & Civitates.* Fortescue *cap.* 24.

CHAP. XI.

Tenure en Villenage.

Señ. 172.

**T**ENURE en Vill unage ē plus properment qut. un villoin tien terres, &c. Solonq. le custome del Manner, ou auterment a la volunt son Seignior, & de faire a son Seignior vilcine service ; Nul terre tenus en villenage ne unqs. fer. home franke, villaine.

Villaine, à villa ; quia villæ adscriptus est.

And therefore a Tenure in Villenage is twofold, one where the person of the Tenant is bond, and the Tenure servile, the other where the person is free, and the Tenure servile. *Servia terra liberos de sanguine existentes, villanos facere non potest ; quia licet faciunt opera servilia, tamen non faciunt ea ratione personarum, sed ratione tenementorum, &c.*

A villain, is called *Nativus*, à nascendo ; quia plerumq; natus est servus. Fo. 116.b.

*Est autem libertas, naturalis facultas ejus quod cuique facere libet \* nisi quod de jure, aut vi prohibetur. Servitus est constitutio de jure gentium, qua quis domino alieno contra naturam subjicitur. Brañt. l.ca.6.* It was ordained, for the cruelty of some Lords that he that killed his vilcine, should have the same judgement as if he had killed a freeman, and thereupon they were called *Servi*, quia servabantur à dominis, & non Occidibantur, & non à serviendo.

Servitude was first inflicted upon *Cham* for dishonouring of his Father *Noah*. *Ante vini inventionem inconcussa libertas : non esset hodie servitus si ebrietas not fuisset. Ambrose.*

When the villain hath an estate of any thing certain, the Lord shall have it, as a Rent, Commons Certain, &c. But the Lord

## Tenure en Villenage.

Lord shall not take advantage of any Obligation, or Covenant, or other thing in action made to the villaine, because they lye in privy, and cannot be transferred to others *D. & St. c. 43. 22. Ass. p. 37.*

*Quicquid acquiritur servo, acquiritur Dom. Fo. 117. a.*

The Statute of *Donis Condic.* giveth remedy to the issues of the Donee (in Taile) that have capacity and power to take and retain such a gift. *Pl. C. 555. Walsing. c.*

*Modus & conventio vincunt legem.*

Señ. 174.

*Aliud est tenere liberè, & aliud tenere per liberum Servitium. Fleta. l. 3. c. 13. Mirr. ca. 2. Señ. 18.*

Señ. 175

*Chest. villaine, ou est un villeine pur tille de prescription sc. que il & ses Aucestors ont este villeines de temps dont memorie ne Court, ou il est villaine per son confession dem. en court de Record.* And every Court of Record is the Kings Court, albeit another may have the profit, wherein if the Judges do erre, a Writ of error doth lie. But the County Court, the 100 Court, &c. are no Courts of Record; and therefore the proceedings therein may be denied and tried by Jury, and upon their judgements a Writ of error lieth not, but a Writ of false judgement, for that they are no Courts of Record, because they cannot hold Plea of debt or trespass, if the debt or damages do amount to 40. s. or of any trespass. *Vi & armis. l. 6. 11. 12. Jenilemans Case.*

Señ. 177.

Il ferr. adjudge le folly del seigneur s'il nentra pas quent les terres, &c. sont en le maine de son villeine.

For before entry, the Lord hath neither *jus in re, nec jus ad rem*: sed, *nullum tempus occurrit Regi.*

The act of law, *i. e.* the descent or escheat may as well prevent the Lord of his entry, as the act of the party by alienation, *fo. 118. a. 9 H. 6. 21.*

Goods

Goods or Chattels are either personal, as a horse and other beasts, household-stuff, &c. or real, as terms for years of Lands, &c. Wardships, the interest of tenant by Statute Staple, &c.

*Nota*, That as the title of the Lord to his villains lands, beginneth by his entry; so his title to the goods beginneth by the seisure of them.

Si le seigneur claime les biens & feisist parcel en nosm. de seisin de tous les biens que le villeine ad ou aver poit, &c.

Such a claim doth not only vest the goods which the villain then hath, but also which he after that shall acquire and get.

*Sect. 179.*

Le seigneur poit maintenant claime le reversion de son villaine, car en aulter forme il ne poit vener al reversion.

And the Lord cannot claim the reversion, but upon the Land, and he by his coming upon the Land for that purpose is no Trespasser.

*Sect. 180.*

Issent le seigneur, &c. poit vener al esglise & claim le Advowson ac son villein, &c. for every claim or demand to devest any estate or interest, must be made in that place, which is most apt for that purpose.

Advowson of a Church is the Right of Presentation or Collation to the Church. Every Church is either Presentative, Collative, Donative, or Elective.

If the Church be Presentative, the Church is full by admission and institution against any common person; but against the King it is not full before induction, fo. 119.b.

Incumbent, of *incumbo*, i.e. to be diligently resident, *id est*, *obnixè operam dare*, 10 H.6,7.

A Church Presentative may become void five manner of waies, viz. 1. By Death. 2. By Creation. 3. By Resignation. 4. By Deprivation. 5. By Cession, as by taking a Benefice incompatible, fo. 120.a. F.N.B. 31, 32.

By

364.

379.



By the Statute of 31 *Elix.* the Presentation, Admission, Institution, and Induction into a Benefice by Simony, are made void; which before were but voidable by Deprivation. Note: If the Church becometh void, albeit the present avoidance be not by law grantable over, yet may the Lord of the villain present, &c. and thereby gain the inheritance of the Advowson, &c. because it is not merely a Chose in action; for if a feme covert be seised of an Advowson, and the Church becometh void, and the Wife dieth, the husband shall present, &c. but otherwise it is of a bond made to the wife, because that is merely in action, 14 H.4.12. 43 E.3.10. 39 E.3.5. 4 H.6.5.

## Sect. 181.

*Ou le villaine & ses Ancestors ont este regardant al Manor, si le seigneur grant mes les villeine par son fait a un auier, donques il est villeine en gros.* He is called Regardant to a Manor, because he hath the charge to all base and villanous services within the same, &c. and his service is not certain, but he must have regard to that which is commanded him. In gross, is that which belongs to the person of the Lord, and belongeth not to any Manor Lands, &c. *Auxi sont villaines en gros par prescript. &c.* Mirr. c.2. sect.18.

## Sect. 183.

53. A man cannot prescribe in any thing by a que estate, that lieth in grant, and cannot pass without Deed or Fine, but in him and his Ancestors he may, because he comes in by descent, without any conveyance. Neither can a man plead a que estate in himself, of any thing that cannot pass without Deed, but in another he may, as in barre of an avowry, the Plaintiff may plead que estate in the seigniorie in avowant, 39 H.6.8. fo.121.a.

When a thing that lieth in grant is but a conveyance to the thing claimed by prescription, there a que estate may be alleaged of a thing that lieth in grant, as a man may prescribe, that he and his Ancestors, &c. in an hundred, have  
time

time out of minde,&c. had a Leet,&c. 11 H.4.89. The Plaintiff shall not entitle him by a que estate, but he must shew how he came by it, but after avowry made the Plaintiff shall plead a que estate, because he is now become as a Defendant, 9 E.4.3.b.

A man may plead a que estate of a tenancy in tail, or an estate for life, so as he averreth the life of them, otherwise it is of a lease for years, or at will, 41. Aff.2. A Disseisor, Abator, Intruder, Recoverer, or any other that cometh in the post, shall plead a que estate, 22 H.6.34. 6 E.4.12. 31 H.8. que estate, Br.48.

A que estate must be alleaged in the tenant or defendant himself, and not in one in the mean Conveyance from whom he claimeth, 11 H.4.81. 9 E.4.3. 1 E.6. qua estate, Br.49.

A Deed pleaded ought to be shewed to the Court, because every Deed must prove it self to have sufficient words in law, whereof the Court must adjudge, and also to be proved by witnesses, and other proof if the Deed be denied, which is matter of fact, fo.121.b. A manor may pass by livery of seisin without Deed, with all things appertaining,&c. without saying, cum pertinent, &c.

231.

Seff. 184.

Nul chose en regardant a un Manor,&c. forsque villeine, mes autres choses come Advowsons, &c. sont appendants, &c.

Appendants are ever by prescription, but appurtenants may be created in some cases at this day, fo.121.b.

Things incorporeal which lie in grant, as Advowsons, Villains Commons,&c. may be appendant to things corporeal, as a Manor, house, and lands; or things corporeal to things incorporeal, as Lands to an Office. But yet they must agree in nature and quality, for a Common of Turbary, or of Estovers, cannot be appendant or appurtenant to land, but to a house to be spent there, vide lib. &c.

61.

Item, Nothing can be properly appendant or appurtenant,&c. unless the principal or superior thing be of perpetual

tual subsistence and continuance. | Offices of fee, are of perpetual subsistence; either being *in esse*, or in that they are grantable over, fo. 121. a. vide, &c.

123. Note, That an Advowson at one turn may be appendant,  
 14. and at another turn in gross; as if the Manor be divided between Coparceners, and every one hath a part of the Manor, without saying any thing of the Advowson appendant, the Advowson remains in Coparcenary, and yet in every of their turns, it is appendant to that part which they have, and so it is if they make Composition to present against common right, yet it remains appendant. But if upon such a partition an expresse Exception be made of the Advowson, then the Advowson remains in Coparcenary and in gross, and so are the books reconciled, 13 E. 2. qu. imp. 170. 9 El. Dyer 249. 2 H. 7. 5. vide, &c.

*Common* If a man purchase part of the Land wherein Common appendant is to be had, the Common shall be apportioned, because it is of Common right, but not so of a Common appurtenant, or of any other Common of what nature soever. But both Common appendant and appurtenant shall be apportioned by alienation of part of the Land, &c. and for Common appurtenant one must prescribe, *i. e.* for Beasts not commonable, as Swine, Goats, &c. l. 4. 35, &c. *Tirringhams Case.*

A Common in grosse appertaineth to no Land, and must be by writing or prescription. Fo. 122. a.

If a tenancy escheat the Lord *ne in cresa son common car ē aperu al dems. & nemy al services.*

A man may prescribe to have *Separalem pasturam*, or to have *solam vesturam terræ*, from such a day till such a day, and thereby the owner of the soile shall be excluded to pasture or feed there. So a man may prescribe to have *separalem piscariam* in such a water, and the owner of the soil shall not fish there, but if he claime to have *Communiam piscariæ*, or *liberam piscariam*, the owner of the Soil shall fish there, 3 E. 3. 29. 30. 20 H. 6. 4. 10 H. 7. 24.

A man seised of Land, whereunto Common is appendant, and

and is disseised, the Disseisee cannot use the Common untill he entreth into the land, &c. because it should be a prejudice to the tenant of the soil; for if the Disseisee might do it, the Disseisor also might put on his cattel, which should be a double charge to the tenant. But otherwise it is in case of an Advowson appendant, &c. 19 H. 6. 33. vide *Señ. 541.*

*Señ. 185. and 186.*

Si home voile en Court de Record soy conufter dest villeine, que ne fuit villeine adevant, tiel est villeine en grosse.

This is intended whete he is brought into Court by course of Law, *Vide libr. ꝑc. fo. 122. b. 25. Ass. 62. 37. Ass. 17.*

*Feme que est utlage enim dit waive, waiviata, i. e. derelicta, left out, or not regarded, and not utlegata, or exlex; for that women are not sworn in Leers, or Tourns, as men which be of the age of 12 years or more be, vide. ꝑc. Reg. Orig. 132. 3 H. 5. tit. Utlawry Statham.*

*Señ. 187, &c*

Lex Angliæ nunquam matris sed semper patris conditionem imitari partum judicat. Surculus torum alimentum à stipite capit, poma tamen edit sua. *Fortescue c. 42.*

Si mulier serva copulata sit libero, &c. quod partus habebit hereditatem & mater nullam dotem, quia mortuo viro libero redit in pristinum statum servitutis nisi hæres ei dotem fecerit de gratia. *Brass lib. 4. fo. 298. b.*

A child was born after the father deceased per undecim dies post ultimum tempus legitimum (sc. nine months, or forty weeks) mulieribus constitutum; and it was adjudged, *Quod dici non debet filius, ꝑc. Trin. 18. E. i. Rot. 61. Beaf. coram Rege.*

Un villeine n'avar action envers son seigneur; mes en special cases, &c. il poit aver action, &c. sicome appeal de mort son pere, &c. Auxi un Niese avant un appeale de

H

Rape

Rape en vers sa seigneur. W.1. c. 13. W.2. cap. 35.

Sett. 191, and 192.

The Villain shall have an action as Executor against his Lord, and it is no plea for the Lord to say, that the Plaintiff is his villain, for he shall not be enfranchised by the user of this action, because he hath it by a gift in Law to the use of the Testator, and not to his own use. (Note, Damages recovered by the Executor in an action of Trespals shall be assets, and yet they were never in the Testator, 21 E.4. 4. b. 1 H.4.6.

Not onely tenant in tail, and tenant for life of a Villain, shall have the perquisite of the Villain in fee, but tenant for years, and tenant at will also shall have it in fee; for the law respecteth not the quantity of the estate, but the law respecteth the quality; for in what right he hath the Villain, in the same right he shall have the perquisite, &c. For if a man hath a Villain in the right of his wife, and after he is intituled to be tenant by the Curtesie in his own right, he shall have the perquisite to him and his heires, vide lib. &c. fo. 124. b.

131. Protestation is an exclusion of a Conclusion, that a party to an action may by pleading incur; or it is a safeguard to the party which keepeth him from being concluded by the plea he is to make, if the issue be found for him: but in this case without a Protestation, albeit the issue be found for the Lord, the Villain shall be enfranchised. S. 192 Pl. c. 276. in Greysbrooks Case.

Sett. 193.

Three things be favored in Law, Life Liberty, Dower.

Trial, is to find out by due examination the truth of the point in issue or question between the parties, whereupon Judgement may be given.

Quaestio juris, shall be tryed by the Judges either upon a Demur, speciall Verdict, or Exception, for cuilibet in sua arte perito est credendum, & quod quisque norit in hoc se exerceat

ceat, & ad questionem juris non respondeant juratores: But questio facti shall be tryed by the Verdict of Twelve men, fo. 125. a, vide, &c.

If the Jury cometh out of a wrong place, or returned by a wrong Officer, and give a Verdict, Judgement ought not to be given upon such a Verdict, qu. &c.

Every ~~plea~~ <sup>plea</sup> must come out of the Neighborhood of a Castle, Manor, Town, or Hamlet, or place known; <sup>within which the fact is alleged</sup> out of a Castle, &c. as some Forrests, &c. for that the inhabitants, &c. may have the better and more certain knowledge of the fact, 3 E. 3. 73. 20. H. 6. 30, 7. H. 4. 27.

Every plea concerning the person of the Plaintiff, &c. shall be tryed where the Writ is brought. Where the matter alleged extendeth into a place at the Common Law, and a place within a Franchise, it shall be tryed at the Common Law.

In an action against two, the one pleads to the Writ, the other to the action, the plea to the Writ shall be first tryed, for if that shall be found, all the whole Writ shall abate, and make an end of the business, 8 E. 4. 24.

In a plea personall against divers Defendants, the one Defendant pleads in barre to parcell, &c. and the other pleads a plea which goeth to the whole. sc. to both Defendants; this last plea shall be first tryed: for in a personall action the discharge of one is the discharge of both; but in a plea reall it is otherwise, 15 E. 4. 25. b. &c. vide lib. &c, fo. 125. b. 9. H. 6. 46.

Where an issue is joyned for part, and a Demurre for the residue, the Court may direct the tryall of the issue, or judge the Demurre first, &c. l. 5. 36 b.

*Omnis consensus tollit errorem*, fol. 1126. a. \*

Issue, *exitus*, a single, certain and materiall point issuing out of the allegations or pleas of the Plaintiff and Defendant, consisting regularly upon an Affirmative, and Negative, to be tryed by Twelve men; and it is twofold; A speciall Issue, as here in the case of Littleton; or generall, as in Trespass, Not guilty, in Assise, nul tort, nul disseisin, &c.

And as an Issue naturall cometh of two severall persons, so an Issue legal issueth out of two severall Allegations of adverse parties, vide Sect. 414.

An Issue being taken generally, referreth to the Count, and not to the Writ, 7. E. 3. 34. vide. &c.

A speciall Issue must be taken in one certain materiall point which may be best understood and best tryed. 20 E. 3. Issue 31. 22. E. 4. 28.

An Issue shall not be taken upon a Negative pregnant, which implieth another sufficient matter, but upon that which is single and simple, as *Ne dona pas par le ft.* imply a gift by Parol, therefore the Issue must be *Ne dona pas modo & forma.* 21. H. 6. 9. b. 16. E. 4. 5.

An Issue joyned upon an *Absq; hoc, &c.* ought to have an Affirmative after it: Two Affirmatives shall not make an Issue, unless it be lest the Issue should not be tryed. 18. Eliz. Dyer 253. 22. H. 6. 19. 11. H. 4. 79.

Some Issues be good upon matter Affirmative and Negative, albeit the Affirmative and Negative be not in precise words; as in Debt upon a lease for yeares, the Defendant pleads that the Plaintiff had nothing at the time of the lease made, the Plaintiff replies, that he was seised in fee; &c. this is a good Issue. 2 H. 7. 4. 5. H. 7. 12. 26. H. 8. in formidon.

Where the Issue is joyned of the part of the Defendant, the entry is *& de hoc ponit se super patriam*; but if it be of the part of the Plaintiff, the entry is *& hoc petit quod inquiretur per patriam*, 26 H. 8. 3. 15 Eliz. Dyer 353.

There be Negative pleas, that be illces of themselves, whereunto the Demandant or Plaintiff cannot reply, no more than to a generall Issue, which is, *Et prædictus*.

A, *similiter*, As if the tenant do vouch, and the Demandant counterplead, That the Vouche or any of his Ancestors had any thing, &c. whereof he might make a feoffment, he shall conclude, *Et hoc petit quod inquiretur per patriam, & prædictus tenens similiter*. So in a fine Pleaded by the tenant, &c. the Demandant may say, *quod partes finis nihil habuerunt, & hoc petit*.



*petit, &c.* And so in a Writ of Dower, the Tenant plead *un-ques leiste Dower*, he shall conclude, *Et de hoc point se, &c.* 22. H. 6. 57. 59. 3. H. 7. 9. 12. E. 4. 13.

*Filiatio non potest probari*, and therefore the issue must be whether the wife was *ensent* the day of her husbands death. 41. E. 3. 11. b.

A protestation availeth not the Parry, that taketh it, if the issue be found against him; except in some speciall Case\*, as if a man enter into warranty, and taketh by protestation the value of the Land, albeit the plea be found against him, yet the protestation shall serve him for the value. 10 E. 4. *Protest.* 5. Vid. S. 192. \* 30 E. 3. 14.

Señ. 194.

*Si le Seignior Mayhem son villeine, il ser. de ceo endite a le suit del roy, & sil soit de ceo atteint il ferr. un fine al roy. Mes le villein n'ava, &c.* appeal de Mayhem, because that in appeal he shall recover but damages, which the Lord after execution might take again, and so the judgment *inutile & illusory*, and the Law never giveth an action, when the end of it can bring no profit or benefit to the pl. 1 H. 4. 6. b.

*Mahemium* (i. e.) *membri mutilatio*. *Endite* (i. e.) an accusation found by an equest of 12. or more upon their oath; *ἐνδείξιον*, to accuse.

*Finis Sumitur tripliciter.* { 1. For a pecuniary punishment for an offence, &c. against the King.  
2. For a sum given by the Tenant to the Lord.  
3. For the highest & best assurance of land.

If a *præcipe* be brought against an infant, and hanging the Plea, he cometh of full age, he shall be amerced for the delay after his full age. Lib. 5. fo. 49 *Vaughans Case*.

So if the demandant or plainr. be nonsute, or judgement given against him, he shall be likewise amerced *pro falso clamore*. Vide lib. fo. 126. b. &c.

If a Writ do abate by the act of the demandant or plaintiff, or for matter of form, the demandant or plaintiff shall be amerced, but if it abate by the act of God, as by the death

of one, &c. it is otherwise. *Lib. 8. fo. 60. b. Bechers Case.*

Wit, wita, Bote, wera or were old Saxon words, signifie amerciament or compensation, &c.

*Ransome ne forsque redemption de paine corporel pro fine des deniers. Mirror ca. 1 S. 1. and 3.*

Ransome is ever when the Law inflicteth a corporall punishment by imprisonment, (and so is also a fine) but otherwise it is of an amerciament.

Alwaies at the common Law when the Defendant should lose life or member, the writ said *Felonice*, &c.

And now albeit the Law be changed (for the Plaintiff shall recover but damages (yet the writ of appeal saith still *felonice. Vita & membra sunt in manu, seu protestate regis. Bract. Lib. 1. fo. 6.*

This offence of *Mayhem*, is under all felonies deserving death, and above all other inferior offences.

*Inter crimina majora minimum, & inter minora maximum. Inutilis labor & sine fructu non est effectus legis. Non licet, quod dispendio licet. Sapiens incipit à fine. Lex non præcipit inutilia.*

Therefore the Law forbiddeth such recoveries whose ends are vaine, chargeable and unprofitable.

*Señ. 195.*

Demandant and Tenant, in reall actions; plaintiff, and defendant in actions personall and mixt. In a personall action brought by A. B. against C. D. the defence is, and *præd. C. D. defendit vim & injuriam quando, &c. Et damna, & quicquid quod ipse defendere debet. Vide libr. &c. fo. 127. b.*

The defendant in this and the like action can plead no Plea at all before he make himself party by this part of the defence. *1 E. 4. 15.*

*Señ. 196. &c.*

6. Maners de homes y sont queux fils suont action jugement poit estr. demand fils serront respous, &c. 1. Lou vilain suist action euvrs son Seignior. 2. Lou hom. est uslage, sur act. de debt trns. &c. ou enditement 3. Vn alien, &c.

4. Un home que per judgment done envers luy sur un bré de prémunire facias, &c. ē hors del protection le roy. 5. Un home enter, &c. en Religion. 6 Un home que est excommen- 142.  
ge per le ley de St. Eglise. Sils sorront *respondus*, &c. This is the legall conclusion of the plea, when the plea is in disability of the person. Fo. 128.a.

By the common Law, the plaintiffe, or defendant, the demandant or Tenant could not appear by attorney, without the Kings speciall Warrant by Writ, or Letters Patents.

Abusion ē a retenir Attorney sans bré dela Chancery, *Mirr.ca.5.*

Attorneys point estr. tous ceux, aux queux, le voile suffer, fens ne poient este. Attor. ne enfans, ne serfs, ne nul que ē en garde non autrement faut de foy, ne nul criminous, ne nul essoigne, ne. nul que nest a le foy le roy nul que ne poie este Counter, &c. *Mirr.ca.2. Sect. 21.*

If an executor, &c. Sueth any action, utlary in the plaintiffe shall not disable him, because the suit is in *auter droit*, 21 135.  
E. 4.49.b. 21 H.6.30.b.

In a Writ of error to reverse an utlary, utlary in that suit, or at any strangers suit shall not disable the plaintiffe, because if he in that action should be disabled, if he were outlawed at severall mens suits, he should never reverse any of them. 7 H.4.40.

When any man pleads an outlawry in disability of the person he must shew forth the Record of the Outlawry, *Maintenant sub pede sigilli* (because the plea is dilatory) unless the Record be in the same Court. But if he plead an outlawry in bar, if it be denied, he shall have a day to bring in. 6 Eliz. Dyer, 228. F.N.B. 241. *Stanf.pl.cor. 103.*

Note, there be two kind of appearances before the *Quinto exatū*, to avoid the outlawry, viz. an appearance in Deed, i.e. to render himself, &c. and the other is by apparance in Law, i.e. by purchasing a *supersedeas* out of the Court where the Record is, &c. *Tr.44. El.in Co.banco inter Mere & dolburie.*

If the ground or cause of the action be forfeited by the Outlawry, then may the Outlawry be plead in Bar of the

action, as in an action of debt, detinue, &c. But in real actions, or in personall, where damages be incertain, (as in trns. of Battery, of goods, of breaking his cloie, &c.) and are not forfeited by the outlawry, their outlawry must be pleaded in disability of the person. 9 Eliz. Dyer 262. 7 H. 4. 4. b. l. 5. 109. Foxleyes C.

In the reign of King Alfred, and after the Conquest, no man could have been outlawed, but for Felony, the punishment whereof was death, Mir. c. 1. S. 3.

*Vilagatus & praviata capita gerunt Lupina, quæ ab omnibus impunè poterunt amputari, merito enim sine lege perire debent, qui secundum legem vivere recusant. Fleta lib. 1. cap. 27.* But now the Law is changed, for avoyding of inhumanity, &c. Vide 2 Ass. Pl. 3. 2 E. 3. tit. Coron. 148.

In Bractons time, and somewhat before, process of outlawry was ordained to ly in all actions that were, *qu. vi. & armis*, which Bracton calleth *delicta*, for there the King shall have a fine. But since by divers Statutes Process of outlawry doth ly in Account, Debt, Detinue. Annuity. Covenant, Action sur le Case, Action sur le Statute. De 5 R. 2. and in divers other common or civill actions, Bract. lib. 5. fo. 421. 8 H. 6. 9. b. 40 E. 3. 5, &c. 35 H. 6. 6. 40 E. 3. 2.

Sett. 198.

If an alien had issue in English before his denization, that issue is not inheritable to his Father; but if his Father be naturaliz'd by Parliament, such issue shall inherit.

*Ligeantia est vinculum fidei, ligeantia ē legis essentia. Et est duplex, 1 Perpetua, & ista ligeantia est aut nata, aut data. 2 Temporanea, quæ ē aut localis, aut limitata, sc. denizatio pro vita, &c. Vide libr fo. 129. a.*

A man may be born out of the realm of England, yet within the ligeance, as in Ireland &c.

An alien that is in league shall maintain personall action, for an alien may trade, &c. but not real or mixt actions. An alien that is condemned in an information, shall have a Writ of error to relieve himself, & sic. &c.

If an alien be made a Prior or Abbot, the Plea of Alien  
 nec shall not disable him to bring any reall or mixt action <sup>133.</sup>  
 concerning his house, because he is in auter droit. 29 E. 3. Br. <sup>372.</sup>  
 Denizen 15. Sic vide diversitat.

In Littletons Case the tenant or defendant shall neither  
 plead alicu nec to the Writ, or to the action, but in disability  
 of the person as in villenage or outlawry; and Littleton is to  
 be intended of an Alien in league; for if he be an Alien ene-  
 my, the defendant may conclude to the action. Liure de en-  
 tries Ali. 1.

Sett. 199.

The judgment in a Premunire, is that the defendant shall  
 be from thenceforth out of the Kings protection, & his lands  
 and tenements, goods and chattels forfeited to the King, and  
 that his body shall remain in prison at the Kings pleasure.  
 And a man might doe to him as to the Kings enemy, and a  
 man may lawfully kill an enemy. 24 H. 8. Broek Coron.  
 196.

Bur by the Statute 5 Eliz. ca. 1. It is not lawful for any  
 person to slay any person attaint. in premunire, &c. Tenant in  
 taile attaint. in a premunire shall forfeit the Land, bur during  
 his life. Vide lest. 16 R. 2. c. 5.

There be three things whereby every subject is protect.  
 viz. Rex, lex, & rescripta regis. The law is the rule, but it is  
 mute; The King judgeth by his Judges, and they are lex  
loquens The process and the execution which is the life of  
 the Law, consisteth in the Kings Writs. Rex tuetur legem, &  
 lex tuetur jus.

A man attainted of Treason, or Felony, is disabled to bring  
 any action, for he is, extra legem positus, and accounted in  
 Law civiliter mortuus. 4 E. 4. 8.

There is a generall protection of the King, and this ex-  
 tends to all the Kings loyall subjects, &c. and there is a par-  
 ticular protect. by Writ, &c. And this is of two sorts, one to  
 give a man immunity from actions or suits. The second, for  
 the

the safety of his person, servants and goods, lands, &c. from unlawfull molestation, or wrong.

The first is of right, and by law, the second are all of grace, (saving one) for the generall Protection implieth as much. Of the first sort some are, *cum clausula* (*volumus*) and of these protections,

(1) There be four kinds, viz. 1 *Quia profecturus*. 2 *Quia moraturus*. 3 *Quia indebitatus nobis existit* of the matter. 4 When any sent into the Kings service in war is imprisoned beyond Sea. The former two are for staying of suits and actions in generall; and for these, nine things are to be observed. 1 The cause of granting the protect. must be expressed, &c. and it is of two natures, the one concerns service of war, as the Kings Souldier, &c. The other wisdom and counsell, as the Kings Ambassador, *pro negotiis regni*, both these being for the publique good of the Realme, private mens actions and suits must be suspended for a convenient time; for *jura publica anteferenda privatis*, & *jura publica ex privatis promiscue decidi non debent*. A man in execution, in *salva custodia*, shall not be delivered by a protection. 5 Mar. 162 Dyer.

(2) 2 These protections are not allowable onely for men of full age, but for men within age, and for women as necessary attendants upon the Camp, and that in three Cases, *quia lotrix, seu nutrix, seu obstetrix*. 19 H. 6. 51. Vide libr. & qu. fo. 130. 4 F. N. B. 28. l.

Corpor. aggreg. of many are not capable of protect. *profectura*, or *moratura*, for the Corpor. it is invisible.

In every action or plea reall, or mixt against two, &c. a protection cast for the one doth put the plea without day for all, as in debt, &c. 9 E. 3. Prot. 80, 81.

(3) 3 A protect. *profectura* must not be purchased, *pendente lito*, unless it be in a voyage royall: But otherwise it is, of a protect. *Moratura*. 3 H. 6. prot. 2.

A protection cannot be cast, but when the party hath a day in Court, and when if he made default, it should save his default, &c. 4. (6 H. 22.

If a man hath a protection and notwithstanding plead a plea yet at another day of continuance, after that a protection may be cast, so at a day after an exigent, but after appearance he cannot cast a protection in that terme, untill a new continuance be taken, \* 22. F. 3. 4.

And no *proteſt.* either *Profeſt.* or *Morat.* shall endure longer than a year and a day, next after the teste or date of it. 39. H. 6. 39. \*

4. The protection must be to some (certaine) place out of the Realm of England. *Lib. .7. fo. 8. Calvins Case.* (4)

5. In some actions Protection shall not be allowed by the Common Law as appeales of Felony, and *Mayhem*; so it is where the King is sole party, &c. And, in a *Decies tant.* where the King and the subject are plaintiff. (5)

But in late acts of Parliament, Protections in personall actions are expressely ousted. *Bract. Lib. 5. 139. &c.*

In a Writ of Dower *unde nihil habet*, in a *qu. imp. or ass. of Darr. presentment*, in *ass. of no diss.* In a *qu. non misit*, &c. no protection is allowable. *Vide.*

By act of Parliament no protection shall be allowed in attain nor in action against a Gaoler for an escape; nor in pleas of trns. or other contract made, &c. after the date of the same protection. 23. H. 8. ca. 3.

Note injudiciall Writs which are in nature of actions where the party hath day to appear, there a protection doth lie, as in Writs of *Scire fac.* upon Recoveries, Fines, Judgements, &c. So it is in a *quid iuris clamat*, &c. But in Writs of execution, as *habere fac. Scis. Elegit*, execution upon a Statute. *cap. ad Satisf. Fieri fac.* There no protection can be cast for the defendant. *causa qua supra.* 13. E. 3. Prot. 72.

6. No Writ of protection can be allowed, unless it be under the great Seal, and it is directed generally, *Libr. 2. fol. 17. Lanes Case, lib. 8. fol. 68. Trallops Case, 35. Hen. 6: 2.* (6)

7. The Courts of Justice are to allow or disallow of the Protection, &c. be they Courts of Record or not, and not the Sheriff, or any other Officer, 43 E. 3. Prat. 96s (7)

8. The



(8) 8. The protection may be cast by a stranger, or by the party himself; an Infant feme convert, &c. may cast a Protection for the tennant or Defendaut. And the Defendant or tenant casting it, he must shew cause wherefore, &c. but a stranger need not shew any cause, but that the tenant or Defendant is here by Protection, 21. E. 4. 18. 38. H. 6. 131

(9) 9. A protection may be avoided: /1. By the casting of it before it be allowed. /2. By repeal thereof after it be allowed; by disallowing of it many waies, as for that it lieth not in that action, or that he hath no drey to cast it, or for materiall variance between the Protection and the Record, or that it is not under the Great Seal, &c. /3. After it be allowed by *innotescimus*, as if any tarry in the country, without going to the service, &c. over a convenient time after he had any Protection, or repair from the same service, upon information thereof to the Lord Chaucellor he shall repeal the Protection by *Innotescimus*, 13. R. 2. cap. 16. 21. E. 4. 20. vide lib. fo. 131. a & b:

As to the third Protection, *cum clausula volhmus*, the King by his prerogative is to be preferred in payment of his duty or debt, by his Debtor, before any Subject, Register 281. b.

*Theſaurus Regis est fundamentum belli & firmamentum pacis.*

By the Statute of 25 E. 3. cap. 19. the other creditors may have their actions against the King, debtor, and proceed to Iudgement, but not to Execution, unless he will take upon him to pay the Kings debt, and then he shall have Execution for both the two debts.

But in some cases the Subject shall be first satisfied, viz. where the King is intituled to any fine or duty by the suit of the party, as in a *decies tantum*. And so if in an action of Debt, the Defendant deny his Deed, and it is found against him, he shall pay a fine to the King, but the Plaintiff shall be first satisfied, 41. E. 3. 15. 4. E. 4. 16. 17. E. 3. 73. 29. E. 3. 13.

The fourth Protection *cum clausula volumus*, is when a man sent into the Kings service beyond Sea, is imprisoned there, so as neither Protection, Protection or Moration will serve him, and this hath no certain time limited in it, *F. N. B. 28. c.*

Of Protections *cum clausula nolumus*, that are of Grace, vide lib. 7. fo. 9. *Calvins Case, Regist 2So.*

The protection *cum clausula nolumus*, that is of Right, is, That every Spirituall person may sue a Protection for him and his goods, and for the Fermors of their lands, &c, that they shall not be taken by the Kings Purveyor, nor their carriages or cattells taken by other Ministers of the King; Which Writ doth recite the Statute of 14. E. 3. *F. N. B. 29, 30.*

Albeit Queen *Eliz.* maintained many wars, yet she granted few or no Protections; and her reason was, That he was no fit Subject to be employed in her service, that was subject to other mens actions, lest She might be thought to delay Iustice, fol 131. b.

Sect. 200.

*Un homo que est enter professe religion, est civiliter mortuus or mortuus seculo,*

To three purposes, Profession, i. e. the civill death, hath not the effect of a naturall death: 1. This civill death shall never derogate from his own grant, nor be any mean to avoid it; for if tenant in tail make a Feoffment in fee, and enter into Religion, his issue shall have no *Formedon* during his life. 2. It shall never give her a vail, without whose consent he could not have entred into Religion, and therefore his wife shall not be endowed untill his naturall death. But if the wife, after her husband hath entred into Religion, alien the land which is her own right, and after her husband is deraigned, the husband may enter, and avoid the alienation, 31 E. 1. *Dower 176. 21. E. 4. 14. 3.* It shall not work any prejudice to a stranger that hath a former right.

If a disseisor is professed, so as the lands descends to his heir, this descent shall not toll the entry of the disseisee.

A woman cannot be professed a Nun during the life of her husband, 5 E. 4. 3.

But if a man holdeth lands by Knights service, and is professed, &c. his heir within age, he shall be in Ward, 31 E. 3. Collusion 29.

If one joynt-tenant be professed, &c. the land shall survive to the other, 21 R. 2. Judgement 263.

An Abbot, &c. may sue and be sued, &c. for any thing that concerns the house of Religion, *Brass. fo. 415.*

193. A wife is disabled to sue without her husband, as much as a Monk is without his Sovereign, 4 H. 3. Br. 766.

And yet the wife of Sir Ro. Belknap Justice of the Common Pleas, who was exiled beyond Sea, did sue a Writ in her own name, without her husband, he being alive; whereof one said, *Ecce modo mirum, quod femina fert breve Regis non nominando virum conjunctim robore legis*, 2 H. 4. f. 7. a. And King E. 3. brought a *qu. imp.* against the Lady of Maltravers, 10. E. 3. 53. And King H. 4. brought a Writ of Ward against Sibel B. 1. H. 4. 1. b.

And Tho. of Weyland being abjured the Realm for Felony, in the year before, Margery de Mose his wife, and Richard, son of the said Tho. exhibited their Petition of Right into the Parliament, Anno 19. E. 1. for the Manor of Sobbir, wherein her husband had but an Estate for life joyntly with her, and the inheritance in Richard the son by fine,

The Earl of Glocester Lord of the see (who claiming the land by Escheat) had taken the possession thereof, alleged, *Quod non fuit jure consonum quod aliqua scemina intraret in aliquas terras vivente marito suo, &c. Tamen Coram Consilio Domini R. vocat' Thesaurar' & Baron. & Justiciariis de utroq; Banco concordat' est, quod prædicta Margeria rehabeat talem seiseinam, &c. secundum perportum finis prædict' &c. Vide lib. fo. 33. a.*

If the husband had aliened the land of his wife, and after had been abjured the Realm for Felony, the wife shall have a Cur

a Cui in vita in his life time, 31 E. 1. Cui in vita, 31.

The wife of the King of England is of ability and capacity to grant and to take, to sue and to be sued, as a feme sole by the Common Law. And such a Queen hath many Prerogatives; as, she shall find no pledges, for such is her dignity, as she shall not be amerced, 18 E. 3. 1. & 2. The Queen shall pay no Toll, N. B. 235. The Writ of Right shall not be directed to the Queen, no more than to the King, but to her Bayliff, F. N. B. 1. F. But a Protection shall be allowed against the Queen, but not against the King; neither shall the Queen be sued by Petition, but by a *Præcipe*, 21 E. 3. 13. 11 H. 4. 76. b.

If A. be bound to the Abbot of D. A. is professed a Monk in the same Abbey, and after is made Abbot thereof, he shall have an action of Debt against his own Executors, 4 E. 4. 25. 6 E. 4. 4. 22 H. 6. 5. 45 E. 3. 10. a. 5 H. 7. 25. b.

See 201.

Excommunicato interdicitur omnis actus legitimus, ita quod agere non potest, nec aliquem convenire, licet ipse ab aliis possit conveniri. / Excommunicatio nihil aliud est quam Censura à Canone vel iudice ecclesiastico prolata & inflicta privans legitima Communionem Sacramentorum & quandoq; hominum, *Braff. lib. 5. fo. 413. & 426. & c. F. N. B. 64. F.*

None can certify *Excommenugment*, but onely the Bishop, or one that hath Ordinary Jurisdiction, and is immediate Officer to the Kings Courts. As the Archdeacon of R. or the Dean and Chapter in time of vacation.

The Common Law disallows all acts done in disability of any Subject of this Realm by any forren power, as things not authentique, wherof the Judges should give allowance, 16 E. 3. *Sacom. 4. N. B. 64.*

For the manner of Election of Bishops, *vide le statute of 25 H. 8.*

None but the Kings Courts of Record, as the Kings Bench, &c. Justices of Gaol-delivery, &c. can write to the Bishop to certify Bastardy, Mulierty, loyalty of Matrimony, &c. for it is a rule in Law, That none but the King can write

to the Bishop to certifie. *Nullus alius prater Regem potest Episcopo demandare inquisitionem faciendam*, Bract. 1. 3. 106.

Four. is the day of appearance of the parties, or continuance of the plea. And in all Summons upon the Original, there be 15 daies after the Summons before the appearance. But if the Original be returned *tarde*, and *Summons alias* goeth forth, there be nine Returns between the Teste and the Return, 8 H. 6. 20. 8 Eliz. Dyer, 251.

And before the Statute of *Articuli super Chart.* cap. 13. 28 E. 1. in all Summons and Attachments in plea of Lund; there shall be contained the term of 15 daies. But by consent other than common dayes may be taken, 11 H. 6. 23

The use of the Kings Bench at this day is, That if the offence be committed in another county than where the Bench sits, and the Indictment be removed by *Certiorari*, there must be 15 daies between every *Process*, and the Return thereof, &c. *Lib. 9.* 118 *Zachers Case*, fo. 134. b. *vide*, &c.

There is *dies specialis*, as in an Affize in the Kings Bench or Common Pleas, the Attachment need not be 15 daies before the appearance. *F. N. B.* 177. cap.

The day of *Nisi prius*, and the day in bank, is all one day as to pleading, but to other purposes, 21 H. 6. 10. 20. *vide* & *qu.* fo. 135. a.

Resummons or Reattachments, are Writs that the Demandant or Plaintiff, after he hath obtained the Letters of his Absolution, may sue out to bring the Tenant or Defendant again into Court, to have day to answer unto him; and these Writs do lie in all cases when the plea is discontinued, or put without day, either in this case, or in case where the Demandant or Tenant hath his age, or for the *non venue* of the Justices, or in case of a protection or *Essoign de service* *le Roy*, &c. *Bracton*, lib. 5. 425. *Brit. cap.* 74. l. 7. 29, 30.

Note, That in the case of Excommengement, the Writ shall not abate, but the plea to be put without day, untill the plaintiff purchase his Letters of Absolution, &c. but in the other

other five cases (*sc.* of a Villain, &c. *ante* fo: 55. a.) the Writ shall abate, *fo.* 135. b.

But in the case of Outlawry the writ shall abate if he obtain not his pardon. 44 E. 3. 27.

At this day Ideors, Madmen, &c. may sue, for the Sutes must be in their name, but it shall be followed by others. An Ideor shall not appear by Guardian or Prochein amy, or Attorney, but hee must be ever in person, 33 H. 6. 18. F. N. B. 27. G.

But an Infant or a minor shall sue by Prochein amy, and defend by Guardian, 27 H. 8. 11. 20 E. 4. 2. F. N. B. 27. H.

*Scil.* 202, 203, 204.

Si lenfant al age de 14 ans enter en religion, & est professe, le gaodein nad auer remede (quant al gard le corps) forsque breve de ravishment de gard enve s le sôveraigne del meason, & l'entry d'asc' estaur de pleine age que é heire lenfant é congeable : & le gardein en tiel case nad a'c' remede pur le terre, &c. Manumittere idem est quod extra manum, vel extra potestatem alterius ponere.

Every Manumission is an infranchisement, but every infranchisement is not a Manumission, *Mirr. cap. 2. Scil.* 18.

There be two kindes of Manumissions : 1. Expres, when the Villain by deed in expres words is manumilled and made free. 2. Implied, by doing some act, that maketh in judgement of Law, the Villain free, &c.

Libertinum ingratum leges civiles in pristinam redigunt servitutem, sed leges Angliæ semel manumissum semper liberum judicant gratum & ingratum, *Fortescue, cap. 46. fol.* 137. b.

There be some cases where the Villain shall be privileged from the seizure of the Lord, &c.

1. *Ratione loci*, as if a Villain in the ancient Demesne of the King a year and a day, without claim or seizure of the Lord, the Lord cannot seize him, &c. so long as he remains  
and

and continues there, 39 E. 3. 6. b. F.N. B. 79. a.

2. *Ratione professionis*, as if he a Monk be, &c. *Glanv. l. 5. cap. 5.*

3. *Ratione dignitatis*, if he be made a Knight, &c. *Britt. fo. 79.*

4. *Ratione matrimonii*, as if a Neise marry a free-man, she is priviledged during the marriage, &c. But if the Lord himself marry the Neise, then she is infranchised for ever, *Mirr. c. 3. sect. 18. acc. Doff. & Sitw. 141.*

If a Niese be regardant to a Manor, and she taketh a free-man to husband by license of the Lord, and the Lord make a scoffment in fee of the Manor, the husband dyeth, the scoffor shall have the Neise, for that during the marriage she was severed from the Manor,\* and so is *lib. 29. Ass.* (which is falsely printed) to be understood.

If two Coparceners be of a Villain, and one of them taketh him to husband, she and her husband shall not have a *Nuper obiit* against her Coparcener, but after the decease of her husband she shall, 16 H. 3. *Nuper ob. 17.*

When the Lord enableth the Villain to have an action against him, as for Debt, or Annuity, &c. or if he sue against his Villain an Action of Debt, or of Covenant, &c. or giveth to the Villain a certain and fixed estate in Lands, &c. as a lease for years by Deed, or without Deed, this is an infranchisement for ever. But if the Lord attorn to his Villain, &c. or if he release all his right in black Acre, and the Villain is not thereof seised, this is no infranchisement, because it is void, and can give no cause of action, *fol. 138. a. 11 H. 7. 13.*

*Secd. 208.*

The Tenant infeofs the Villain of the Lord, and a stranger \* upon by Collusion; in this case although the Lord may enter upon the Villain for the moiety, yet may he have a Writ of Ward against them both, without infranchisement of the Villain; \*for if the Lord should enter upon the Villain, then should the feignory be suspended, and then  
could



could he not have a Writ of Ward against the other, *vide*  
*&c.*

There is a Nonfute before appearance at the return of the Writ, or after appearance at some day of continuance.

A Nonfute is ever upon a demand made when the De-<sup>234</sup>  
 mandant or Plaintiff should appear, and hee makes de-  
 fault.

A Retraxit is ever when the Demandant or Plaintiff is pre-  
 sent in Court, &c. and this is either Privative, as upon demand  
 made, that he depart in despite of the Court having made  
 default, &c. or Positive, as when he saith, that he will not pro-  
 secure his plea, &c. *sed abinae omnino se retraxit, &c.* fol.  
 139. a. \*

Also a Retraxit is a bar of all other actions of like or infe-  
 rior nature; *qui semel actionem renunciavit amplius repetere*  
*non potest.* But Reg. a Nonfute is not so, but that he may com-  
 mence an action of like nature, &c. again, *lib 8. fo. 58. Bechers*  
*Case.*

But yet for some speciall reasons, Nonfute in some actions  
 is peremptory: as in a *qu. imp.* if the Plaintiff be Nonfute  
 after appearance, the Defendant shall make a Title, and  
 have a Writ to the Bishop, &c. and the Incumbent that  
 commerth in by that Writ shal never be removed, 5 E. 3. 35.  
*lib. 7. fo. 27. b. Sir Hugh Portmans c.* So it is in a Writ *de Na-*  
*tivo habendo in favorem libertatis*, 6 E. 2. Vill. 26. F. N. B. 78.  
 c. And in an appeal of Murder, Rape, Robbery, &c. *in favo-*  
*rem vite*, 9 H. 4. 1. Pl. Ccm. 148 a. 171. And in an appeal of  
*Mayhem*, for the Writ saith, *Felonice Mayhemavit*, 43 Aff 39.  
 And in Attaint; and the reason is, for the saith that the Law  
 gives to the Verdict, and for the fearfull Judgement that  
 should be given against the first Jury, if they should be  
 convicted; and therefore upon the Nonfute the Plaintiff shal  
 be imprisoned, and his pledges amerced; but if the Proceſs  
 in an attaint be discontinued, the Plaintiff may have another  
 Writ of Attaint, because upon the Nonfute there is a Judge-  
 ment given, but not upon the discontinuance, F. N. B. 108. d.  
 32 Aff. 13.

Nonfuit before appearance is not peremptory in any case, for that a stranger may purchase a Writ in the name of him that cause of action hath.\*

In realor mixt actions the Nonfuit of one Demandant is not the Nonfuit of both, but he that makes default shall be summoned and severed, but Reg. in personal actions the Nonfuit of one is the Nonfuit of both, unless it be in certain particular cases. \* F. N. B. 35. b. as in personall actions brought by Executors, &c. lib.\* 6. fo. 25. Ruddocks Case, And in an *Aud. quer.* concerning the personalty \* vide & qu. lib. fo. 139. a.

In a *quid Juris clamat*, the Nonfuit of the one, is the Nonfuit of both, because the tenant cannot attorn according to the grant, 20. E. 3. Severance 17.

Some actions follow the nature of those actions whereupon they are grounded, as the Writs of Error, attain, *Scire fac'* &c. If a reall action be brought by severall *Pracipes* against two or more, if the Demandant be Nonfuit against one, he is a nosuit against all, for as to the Demandant it is but one Writ under one Teste, 47. E. 3. 6. b.

Severance is twofold; viz. by Summons *ad sequend' simul*, and that is when one of the Demandants or Plaintiffs never appeared, and by award of the Court of Nonfuit, without any Summons, and that is after appearance, fo. 149. b.

At the Common Law upon every continuance or day given over, the Plaintiff might have been Nonfuit, and therefore after Verdict given, if the Court gave a day to be advised, at that day the Plaintiff was demandable, and therefore might have been Nonfuit, which is now remedied by the Statute of 2 H. 4. cap. 7. But after demurre in law joyned, if the Court doth give a day over, at that day the Demandant or Plaintiff is Demand, and may be Nonfuit, for that is not holpen by any Statute, 2 H. 5. 5. and after an award to account, the Plaintiff may be Nonfuit, and so note a diversity between an interlocutory award of the Court, and a finall Judgement, l. 11. fo. 39. 41. *Medcalfs Case*.

Albeit the Lord be Nonfuit, yet the enfranchisement  
of

of the villain doth remain, for that grew by the appearance to the Writ. So it is if the Writ do abate.

Wheresoever the Lord giveth to the villain a just cause of action, he is enfranchised. *Kellaway. 134.*

But if the Lord sue his vill. by appeal of Felony, where he was indicted of the same before, this shall not enfranchise the villain, and although he be acquitted upon the appeal, for he shall recover no damages against his Lord. *W. 2. c. 12. 22. Ass. p. 39. 14 H. 7. 2.*

*Seff. 204. and 210. &c.*

None ought to pay fines for the marriage of their daughters without licence of the Lord, &c. but villains of blood, or freemen holding in Villenage. *43 E. 3. 5.*

*Additio probat minoritatem. Hereditas inter masculos jure civili est dividenda. Fort. c. 40.*

*Haud facile emergunt quorum virtutibus obstat  
Res angusta domi—Horace.*

By the Statute of 31 H. 8. a great part of Kent is made descendable to the eldest son. *18 H. 6. c. 1.*

For { *In plures quoties rivos deducitur annis  
Fit minor, ac unda deficiente, perit.*

*Seff. 211. and 212.*

There is a speciall kind of Borough of Engl. as it shall descend to the younger son, if he be not of the half blood, and if he be, then to the eldest son. *32 E. 3. tit. age 81.* within the manor of B. in Comit. Berks, there is such a custome, that if a man hath divers daughters, and no son, and dieth, the eldest daughter shall onely inherit, and if he have no daughter but sisters, the eldest sister by the custome shall inherit, and sometime the youngest. *M. 10. 7a. Eliots c. Brit. 187. b.*

Hor. { *Imberbis juvenis tandem Custode remoto,  
Gaudet equis, Canibusque, & aprici gramine Campi,  
Cereus in vitium flecti, monitoribus asper,  
Utilium tardus provisor, prodigus aris,  
Sublimis, cupidusque & amata relinquere pernix.*

*Nil homine infirmum tellus animalia nutrit  
Inter Cuncta magis———Home.*

Aliquis non debet esse iudex in propria causa. 10 E. 3. 23.  
2 H. 3. 4. H. 4. H. 4. Salop. Coram Rege

Præscriptio que est encouner *reason*, ne doit est. allow  
quia malus usus abolendus est. In consuetudinibus non oiu-  
turnitas temporis, sed soliditas rationis consideranda est. Fo.  
41.2.

Rex, &c. pro cōi utilitate terræ Hiberniæ, & pro unitate  
 terrarum, provifum est quod omnes leges. &c. quæ in Reg.  
 Angl. tenentur, in Hybernia teneantur, &c. Sicut Johannes  
 Rex cum illic effet, ftatuit & firmiter mandavit, &c. Rot. par.  
 30 H. 2. Vid. lib. 141. b.

By an Act of Parliament tent. 10 H 7. est enaët. que tous stat.  
ft. in England devant cela temps ferront in force in Royallme de  
Ireland.

## CHAP. XII.

*Of Rents.*

Seft. 213.

*t.c.*  
*is bond*  
*tenancy*  
*provision*  
*fifely*

Rent service est lou le tenant tient la terre de son Seignior per se rvice and certain rent, & le Seignior poit distr. pur ceo de common right. Rent is reserved out of the profits of the Land, and is not due till the Tenant or Lessee take the profits: for reddere nihil aliud est quam acceptum aut aliquam partem ejusdem restituere; seu reddere est quasi retro dare. Lib. 10 148. Cluns Case. Pl. Com. 138, 139, &c. Browning. c.

58. A rent service cannot be reserved out of any inheritance, but such as is manurable; whereinto the Lord may enter, and take a distresse, as in Lands, &c. Reversions, Remainders, and as some have said out of the herbage of Lands, and not out of any inheritance incorporeall, or that lie in grant.

*Lib.*

*Lib. 5. fo. 4. Seignior Mountjoyes c. l. 7. f. 23. Buts c. Pl. com. 139.* By Act of Law one rent or service may issue out of another. 35 H. 6. 21. And though it be out of lands, &c. Yet it must be out of an estate that passeth by the conveyance, and not out of a right, 10 E. 4. 3. b. As if the disseisor release to the disseisor of the Land, reserving a rent, the reserve is good, *Fo. 144. a.*

*Non debet esse reservatio de proficiis ipsis, quia ea conceduntur, sed de redditu novo extra proficiis, 38 H. 6. 38. a. Fol. 142. a.*

The common Law is the best and most common birth-right that the subject hath for the safeguard of his lands, &c. 2 H. 4. c. 1. Justice is the daughter of the Law, for the Law bringerh her forth.

A rent service may be reserved without Deed, 35 H. 6. 34.

### Señ. 215, &c.

*On home sur un done en Taile ou lease, &c. voile reserv. a lu rent service, il covient que le reversion, &c. Soit en le doner ou lessor, &c.* This is not to be understood only of a reversion immediately expectant upon the gift or Lease, for if a man make a gift in taile, the remainder in taile, reserving a rent, and keep the reversion in himselfe, this is a rent service. *Fo. 142. b.*

Reserver, sometimes hath the force of saving or except. so 59. as sometimes it serveth to reserve a new thing, viz a Rent-8 E. 4. 48. Sometime to except part of the thing in esse that is granted. 35 H. 6. 34. In the grant of a reversion, the rent may be excepted, but not the services. If a man make a gift in taile, without any reservation, the donee shall hold of the donor by the same services that he held over. | The Law regardeth equity and equality without any provision or reservation on the party. *B. f. 100. Ipsa etenim leges cupiunt ut iure regantur.* 276.

But if the Lessor for life or years reserve h nothing, he shall have fealty only, which is an incident inseparable to the reversion. 38 E. 3. 7. *Littl. fo. 4.*

Sect 217. and 218.

Rent must be reserved to him from whom the State of the Land moveth, and not to a stranger, 18 E. 2. Aff. 381. But (one do hold that otherwise it is in the case of the King, 35 H. 6. 36 \*

Note, that upon a reservation of a rent upon a feoffment in Fee by Deed Indenture, the feoffor shall not have a Writ of annuity, because the words of reservation, as *Reddendo*, &c. are the words of the Feoffor, and not of the Feoffee, albeit the Feoffee by acceptance of the State is bound thereby, 33 E. 3. Annuity 52. 1 H. 4. 5.

And it is holden, that a reservation upon a Feoffment in Fee made by Deed Poll, is good, 8 E. 4. 8.

Auxi si un home Sei. de cert. terre grant per unfr. Poll ou per Indentare un annual rent issuant hors de m. la terre a un autre in Fee, ou in fee taile, ou per terme de vie, &c. ovesque clause de distresse, &c. donques ceo est rent charge, & si le grant soit sans clause de distresse donques il est r. seck i.e. redditus siccus.

Also a man may have a rent by prescription, 19 E. 3. Title 34.

Sect. 219.

158 If a man grant by his Deed a rent charge to another, and the rent is behind, the grantee hath election to bring a Writ of annuity, \* and charging the person only, &c. or to d strain upon the Land, and to make it real, \* and charging the person onely, to make it personal. Put case that A. be seised of Lands in fee, and he and B, grant a rent charge to one in fee, this *prima facie* is the grant of A, and the confirming of B. but yet the grantee may have a VVrit of Annuity against both. Two men grant an annuity of 20 l. per an. to another, although the persons be severall, yet he shall have but one annuity: But if the grant be, *Obligam. nos, & utrumq. nostr.* The grantee may have a VVrit of Annuity against ~~B~~ ei her of them, but he shall have but one satisfaction, 16 E. 2. tit. annui-  
 159 if you charge the land, the land is bound, & the person is not bound. But if you charge the person, the person is bound, & the land is not bound.

ty 47. If a rent charge be granted to a man and his heirs, he shall not have a Writ of annuity against the heire of the grantor, albeit he hath Assets, unless the grant be for him and his heirs. 2 H. 4. 13. Dyer 17 Eliz. 344. b. Vide *q̄c.* Fo. 144. b.

But *Littl.* is to be understood with some limitation: for of a rent granted for owelty of partition, a writ of annuity doth not ly, because it is of the nature of the Land descended. Also of such a rent as may be granted without Deed a Writ of annuity doth not ly, though it be granted by Deed. 29 Aff. p. 23.

Note, as to elections, these diversities following.

1 When nothing passeth to the Feoffee or Grantee before election; &c. There the election ought to be made in the life of the parties, &c. / But when an estate or interest passes immediately to the Feoffee, Donee, or Gaantee, there the Election may be made by them, or by their heirs, or executors, *Lib. 2. fo. 36. q̄c. Sir Row. Haywards c.* (1)

2 When one and the same thing passeth, &c. and the Donee, or grantee hath election in what manner or degree he will take this, there the interest passeth immediately, and the party, his heirs or executors may make election when they will. (2)

3 When election is given to severall persons, there the first election made by any of the persons shall stand. (3)

4 In case an election be given of two severall things, always he which is the first agent, and ought to doe the first Act, shall have the election. 2 H. 7. 23. a. (4)

5 When the granted is of things annuall, and are to have continuance, there the election remaineth to the grantor (in case where the Law giveth to him election) as well after the day as before; otherwise it is when the things are to be performed unica vice, 9 E. 4. 36. and 13 E. 4. Grantee for life, &c. ought to bring his Writ of annuity in the disjunctive, else the judgment, &c. shall determine his election for ever: here in *Fitzb.* is mistaken. (5)

6 The Feoffee by his act and wrong may lose his election and (6)



and give the same to the Feoffor; as if one infeoffe another of two acres, to have and to hold, the one for life, and the other in tail, and he before election make a Feoffment of both, in this case the Feoffor shall have election to enter into which of them he will, &c.

150. Note that this determination of the election of the grantee must be by action or sure in Court of Record. If the grantee doth bring a Writ of annuity, and at the returne thereof appear and account, this is a determination of his election in Court or Record, albeit he never proceedeth any further. *F.N.B. 152.4.5 H.7.33.b* So if the grantee bring an Ass. for the rent, and make his plaint, he shall never after bring a Writ of annuity. *10 E.4.17.*

For an Anvewry in Court of Record, which is in nature of an action, is a determination of his election before any judgment given. *F. 145.b.*

It is a generall rule, that the plaintiffe must have the property of the goods in him at the time of the taking. *3 E.3. 74. 6 H.4.2.* But yet if the goods of a villain be distreined, the Lord of the villain shall have a Replevy, because the bringing of a Replevy amounts to a claim in Law, and vests the property in the plaintiff. But in that case if the goods of a villain be taken by a trans. the Lord shall have no Replevy, because the villain had but a right. *33 E. 3. Repl. 43. F.N. B. 69 F.*

Property ought to be tryed by Writ. *30 E. 3.22.*

A man cannot claim property by his Bayliffe or servant, for that, if the claim fall out to be false, he shall be fined for his contempt, which the Lord cannot be unlesse he maketh claim himself, for *nemo punitur pro alieno delicto*. *5 E.3 38. 11 H.4.4.fo.145.b.*

In a speciall case a man may have a Replevy of goods not distreined, as if the Mesner put in his catrell in lieu of the cattel of the tenant per avails, that he is bound to acquite, he shall have a Replevy, &c. *34 H.6.47.*

It is against the nature of a distresse taken, &c: to be irreplevisable. *31 E.3. Gage Delin. 5. And Bract. Lib 4.fo.233.a.*  
and

and b. Saith, *Eodem modo de via obstructa, per breve quod iusticiet propter cōm utilitatem, ne transeuntes ire diu impediuntur, quia hoc esset communz damnum, & in hoc vicecomes & Iusticiarii faciant sicut super detensionem averior. contra vadium plegii propter commune utilit. ne animalia diu inclusa pereant.*

If the beasts of divers severall men be taken, they cannot joyn in a Repleg, but every one must have a severall Repl. and so in a Repleg. it is a good plea, to say that the property is to the plaintiff, and to a stranger, and where there be two plaintiffes, that the property is to one of them. 28 E.3.92.2 E.4.23.

*Electio semel facta, & placitum cestatum ò patitur regressum Quod semel in electionibus placuit amplius displicere nō potest.*

Note, a diversity between the case (\* fo. 64<sup>50</sup>.) aforesaid of the grant of the rent, where he may take it either reall or personall, and when a man may have election to have several remedies for a thing that is meerly personall, or meerly reall from the beginning. As if a man may have an action of account, or an action of debt at his pleasure, and he bringeth an action of account, and appear to it, and after it Nonsuit, yet may he have an action of debt afterwards, because both actions charge the person. So it is of an Ass. and of a Writ of entry in the nature of an Ass. &c. 28 E.3.98.b. 27 E.3.89.b. Fo. 146.a.

### Self. 220.

By this Section it appeareth, that when in a general grant, the Law doth give two remedies, that the grantor may provide, that the grantee shall not use one of them, and leave the party to the other. But where the grantee hath but one remedy, that remedy cannot be barred by any proviso, for such a proviso should be repugnant to the grant. 28 H.8. Dyer. 9.b.

And if a man by his Deed grant a rent Charge out of land provid. that it shall not charge the Land, albeit the grantee hath a double remedy, yet the proviso is repugnant, because the Land is expressely charged with the rent, but the Writ of annuity

annuity is but implied in the grant, and therefore that may be restrained without any repugnant, and sufficient remedy left for the grantee; for which cause *Lint.* putteth his case of the restraint of bringing a writ of annuity. Also our Author putteth his case of a rent charge continuing; and of a rent charge issuing truly out of Land, 9 *H. 11. 53. 11. H. 8. &c. mala grammatica non vitiat cartā.* For the Law that principally respecteth substance, doth judge sometimes a double negative, to be a negative, according to the intent of the parties, and not according to grammaticall construction.

## Sect. 221.

A. grants that B. shall distrein for such a yearly summe of money in his mannor of D. in judgements of Law the Mannor is charged with the rent, but the person of the grantor cannot be charged, because he expressly granteth no rent, \* for that would charge his person, but that the grantee should distreine, &c. which onely chargeth the land. *fo. 146. b.*

If a rent be granted out of the Manor of D. and the grantor grant over, That if the rent be behind, the grantee shall distrein, &c. in the Manor of S. this is but a penalty in the Manor of S. But both Manors are charged, the one with the rent, the other with the distresse for the rent, the one issuing out of the land, and the other to be taken upon the land, *lib. 7. fo. 23, &c. in Buts Case.*

*Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba expressa fienda est.*

And if in this case, this shall amount to the grant of a rent out of the Manor of S. then the grantor shall be twice charged; and so the Law by construction against the words, and the intention of the parties, shall doe injury to the grantor, &c. *fo. 147. a.*

And there is no diversity in this case, when the Manor of S. lyeth in the same county, and when it lyeth in another county, for the words in both cases are all one, and there is

no reason to say that he shall fail of a Recovery by Assize, lib. 7. f. 3. *Bulwars Case*, *R. Ass.* p. 10. *Vide &c.*

If a man grant a rent out of three acres, and grant over, that if the rent be behind, that he shall distrain, &c. in one of the acres, this rent is entire, and cannot be a rent seck out of two acres, and a rent charge out of the third acre; and therefore it is a rent seck for the whole, and yet he shall distrain for this in the third acre, *vide &c. qu.*

A. doth bargain and sell land to B. by Indenture, and before Inrolment they both grant a rent charge by Deed to C. and after the Indenture is inrolled; by the operation of the Statute, it shall be the grant of B. and the confirmation of A. But if the Deed had not been inrolled, it had been the grant of A. and the confirmation of B. and so *quancunq; via data* the Grant is good.

Home seise de 20 acr. grant rent 20s, hors de chesc. acre. &c. le grantee aña 20 l. 22. H. 6. 10. b.

*Señ. 222, &c.*

*Si home ad un rent charge a luy & a ses heires issunt hors de cert' terre, sil purchase asc' parcel de cel a luy, & a ses heires, tout le rent charge est extint, & l'annuity auxi, pur ceo que rent charge ne port estr. per tiel Manor apportion, mes si tiel parcel discend, &c. (S. 224.) a le firs, auterment est. Auxi per purchase de parcel, &c. rent service point estre apportion.*

A rent charge by the act of the party may in some case be apportioned: As if a man hath a rent charge of 20 s. he may release to the tenant of the land 10 s. and reserve part, for the grantee dealeth not with the land, as in case of purchase, *Hill. 14. Eliz. in Communi Banco F. N. B. 152. d. e.*

If tenant *pur auter vie*, by his Deed grant a rent charge to one for 21 years, *Cesty que vie* dyeth, the rent charge is determined, and yet the grantee may have during the years a Writ of annuity for the arrerages incurt. after the death of *Cesty que vie*, because the rent charge did determine by the act of God, and by the course of Law, *Actus legis*  
null;

*nulli facit injuriam.* Wards cited in lib. 2. In Heywards case fo. 36.

There be divers kinds of rent services which are not within the Statute of *Quia empt. terra*, and yet such rent services are apportionable by the common Law. As if the lessor recover part of the land, &c. in an action of waste, or enter for a forfeiture in part, &c. Lib. 6. f. 1. &c. Bruerton. c. Lib. 8. f. 105. &c. Talbots case. So likewise if the lessor grant part of the reversion to a stranger, the rent shall be apportioned, for the rent is incident to the reversion. Lib. 8. fo. 79. Wildes case.

A rent service may be extinct for part, and apportioned for the rest, but a rent service cannot be suspended in part by act of the party, and in esse for other part.

For if the lessor disseise the lessee, the rent is suspended for the whole, and cannot be apportioned for any part. But otherwise it is where the lessor enters lawfully, as upon a surrender, forfeiture, &c. Where the rent is lawfully extinct in part. 21. E. 4. 29.

And yet by act in Law a rent service may be suspended in part, and in esse for part. As if the tenant give a part of the tenancy to the Father of the Lord, in taile, the Father dieth, and this descends to the Lord, in this case by act in Law the Seignory is suspended in part and in esse for part, and the same Law is of a rent charge. 30. Ass. p. 12.

And when the Guardian in chivalry entreth into the Land of his ward within age, now is the Seignory suspended; but if the wife of the tenant be endowed, &c. Now shall she pay to the Lord, the third part of the rent, 33. E. 3. Dower 138, this case I should have put first *Tho. More*.

161. Item, a Seignory may be suspended in part by the act of a stranger, as if two jointenants or coperceners be of a Seignory, and one of them disseise the Tenant of the Land, the other joyntenant or copercener shall distreine for his or her moiety. 27. E. 3. 88.

Concerning the apportionment of rents there is a difference between a grant of a rent, and a reservation of rent. 22 H. 4. 17. A man against his own grant shall not take advantage

vantage of the weakness of his own estate in part. *vide lib. 6. fo. 148. 6.*

And note a diversity between a rent in grosse, and a rent incident to a reversion. 352.

If a man grant a rent charge out of two acres, and after the grantee recovereth one of the acres against the grantor by a Title Paramount, the whole rent shall issue out of the other acre: But if the Recovery be by a feint Title by Covine, then the rent is extinct in the whole, because he claimeth under the grantor, *Doct. & Stud. l. 2. c. 17.*

And yet in some cases a rent charge shall not be wholly extinct, where the grantee claimeth from and under the grantor. As if B. make a Lease of one acre for life to A. and A. is seised of another acre in fee; A. granteth a rent charge to B. out of both acres: and doth waste in the acre which he holdeth for life, B. recovers in waste, the whole rent is not extinct, but shall be apportioned, &c. for that, *Nullus Commodum capere potest de injuria sua propria.*

If the King give two acres of land of equall value to \* another in fee, fee tail, for life or for years, reserving a rent of Two shillings, and the one acre is evicted by a Title Paramount, the rent shall be proportioned, *F. N. B. 234. b.*

If an entire service be *pro bono publico*, as Knights service Castleward, &c. though the Lord purchase part, the service remains: but when entire services are for the private benefit of the Lord, it is otherwise, *lib. 6. fo. 1, 2. Bruertons Case. Sed vide lib. 6. fo. 149. a.*

*Señ. 223 and 224.*

Reg. it holdeth, That *que in partes dividi nequeunt, solida à singulis præstantur*, *Vide los reports Bruertons Case, lib. 6. Talbots Case, l. 8. f. 104.*

If there be Lord and Tenant by Fealty and Herriot service, and the Lord purchase part of the land, the Herriot service is extinct, and yet it is not annual because it is entire and valuable. But otherwise it is of Herriot Custome, *fo. 149. b.*

If

If the tenant giveth to the father of the grantee of a rent charge part of the rent in tail, and this descend to the grantee, the rent charge shall be apportioned, and so by act in law a rent charge may be suspended for one part, and in esse for another. 30. Aff. p. 12, fol. 149. b.

And so it is if the father be grantee of a rent, and the son purchase part of the land charged, the father dyeth, and the rent descends to the son, the rent shall be apportioned: and so it is if the grantee grant the rent to the tenant of the land, and to a stranger, the rent is extinct but for a moiety. 34. H. 6. 43. b.

If a man hath Issue two daughters, and grant a rent Charge to one of them out of his land, and dyeth, the rent shall be apportioned; and if the grantee in this case infeofeth another of her part of the land, yet the moiety of the rent remaineth issuing out of her Sisters part, because the part of the grantee in the land by the descent, was discharged of the rent.

150 But in all these Cases where the rent charge is apportioned by act in law, yet the Writ or Annuity faileth; for if the grantee should bring a Writ of Annuity, he must ground it upon the grant by Deed, and then must he bring it for the whole, 9 Aff. 22. 5. R. 2. Annuity 21.

*Annua nec debitum iudex non separat ipsum.*

Also in respect of the reality, the rent is apportioned, but the personality is indivisible, &c.

If Execution be sued &c. upon a Statute Merchant or Staple, and after the inheritance of part of those lands descend to the Consee, all the Execution is avoyded, for the duty is Personall, and cannot be divided by act in Law, Pl. Com. 72. 15. E. 4, 5.

If the father within age purchase part of the land charged, and alieneth within age, and dyeth, the Son recovereth in a Writ, *Dum fuit infra etat.* or entreth; in this case the act of the Law is mixt with the act of the party, and yet the rent shall be apportioned; for after the recovery or entry, the Son hath the land by descent, fo. 150. vide, &c.

Are



A relation or fiction of Law shall never work a wrong, or charge to a third person, but in *fictione juris semper est equitas*. lib. 3. fo. 29. Butler and Bakers Case.

5 if the Feoffee grant a rent charge, al feoffer & son feme & al heires del Baron feme recover Dower; le rent charge ferra apportion & el distreinam, &c.

## Sess. 225.

If there be Lord and Tenant by Fealty and Rent, and the Lord by his Deed reciting the Tenure, release all his Right in the Land, saving the said rent; the seigniority remains, and he shall have the rent as a rent service, and the fealty incident to it, &c. 12 E. 4. 11. 9 E. 3. 1.

If the Donee hold of the Donor by fealty and certain rent, and the Donor grant the services to another, and the tenant attorn, the rent shall passe as rent seck, fol. 150. b.

If there be Lord and Tenant by fealty and certain rent, and the Lord grant the rent in tail, or for life, saving the fealty; and further grant, That the grantee may distrain for it, albeit the reversion of the rent be a rent service, yet the Donee or Grantee shall have it but as a rent seck, and shall not distrain for it 7 E. 3. 23. adjudg.

Whereas in an Assize for a rent service, all the tenants of the land need not be named, but such as did the disseisin; yet in Assize for the rent seck, which sometimes was a rent service, all the tenants must be named, as in case of a rent charge, albeit he was disseised but by one sole tenant, 4 E. 2. Ass. 449. 26 H. 8. Dyer 31.

But if the Lord of a Manor release the Fealty to his Tenant, saving the rent; or that a Mesnalty become a rent by Surplussage, those that are now seck (and sometimes were service) are part of the Manor; but a rent charge cannot be part of a Manor, 31 Ass. 23. 22 Ass. 53.

## Sess. 226, &amp;c.

If there be Lord and Tenant by Fealty and Rent, the  
K annual

annual rent, which is a profitable service, is of higher and more respect in Law, than the fealty, and therefore by the grant of the rent, the Fealty shall pass as incident, &c. but it is an incident separable, and therefore may be by a saving, as Littleton hath said, separated by it. And so when the Tenure is by Fealty and rent, and the rent be recovered, the Fealty shall includedly be recovered, 44 E.3.19. 26 Aff.38. 8 E.4.28.

So long as Homage continues, the Fealty cannot be divided from it, *vide lib. &c. 151 a.*

Note a diversity between these corporeal services of Homage, Fealty and Escuage, which cannot become seek or dry, but make Tenure, whereunto Distresses, Escheats, and other Profits be incident; and other corporeal services, as a Plough, Repair, Attend, &c. And all Rents whatsoever, for they may become seek, and make no Tenure.

193. Rent and Fealty are incident to the Reversion, viz. Rent separably, and Fealty inseparably, 12 E.4.3. *Doff. & Stud. lib.2.c.9.*

337. The incident shall pass by the grant of the Principal, but not e converso. *Accessorium non ducit sed sequitur suum principale. fo. 152 a.*

If the Tenant infeoff the Lord Paramount, and his wife, and their heires, in this case the Mesnalty is but suspended; for if the wife survive, both Mesnalty and Seignory are revived, 7 Aff.2. 7 E.3.20.

It is said, that if there be Lord Mesne and Tenant, each of them by Fealty and 6 d. the Lord confirm the state of the Tenant to hold of him by Fealty and 3 d. that the Mesnalty is extinct. So it is if the Lord releate to the Tenant; for whether the Lord purchase the Tenancy, or the Tenant the Seignory, the Mesnalty is extinct. 8 H.6. 24. fo. 152.b.

So if there be Lord and Tenant, and the Tenant make a gift in tail, the remainder to the King, the Seignory is extinct, 4 & 5 P. & M. Dyer 154. *Lex citius tolerare vult pri-*

*privatum damnum quam publicum malum*, 13 H. 4. 3. 40. Aff. p. 27.

No man can hold one and the same land immediately of two severall Lords. And one man cannot of the same land be both Lord and Tenant.

It is Reg. true, *Res inter alios acta alteri nocere non debet.* 156. *Et factum unius alteri nocere non debet*; which are true, with this Exception, unless an inconvenience should follow, &c.

*Quando lex aliquid alicui concedit, concedere videtur & id sine quo res ipsa esse non potest*: And therefore if a man maketh a lease for life, reserving a rent, and binde himself in a Statute, and the Cognisee hath the rent extended, and delivered to him, he shall distrain for the rent, because he commeth to it by course of Law, 13 H. 4. Avowry 237.

*La ley voet plus tost suffer un mischiese que un inconvenienc; & pur ceo si Mesne tient per 12 d. & tenant per 5 s. & le seigneur purchase le tenancy, le seignory del Mesnalty ē extinct. Et le mesne aña 4 s, come rent seck de le seigneur.*

### Seck. 233.

*Si home que ad rent seck est un foirs sei, d'asc' parcel de la rent, & apurs le tenant ne voile payer le rent aver, il aña ass. de novel diff.*

A rent seck or rent charge may be demanded after it is behinde at any time, &c. for, Remedies for Rights are ever favourably expounded, M. 41. E. 4 adjudged. 204

If the demand be made upon the land, and the rent is not paid, whether the tenant be present or absent, yet this is a denyall in Law, &c.

Disseisna, is a putting out of a man out of seisin; and ever implyeth a wrong. But dispossessing or ejectment is a putting out of possession, and may be right or by wrong, Bract. l. 4. f. 161. Mirr. c. 2. f. 185.

*Disseisin est un personal trespass de tortius ouster del seisin.*

Where the Statute of Merton (20 H. 3.) saith, *Disseisitus de*

*de libero tenemento.* Littleton expounds it to extend to a rent seck or rent charge, albeit they be against common rights, yet a man hath a Freehold in them, 40. *Ass.* 23. ac.

And he that granteth *omnia tenementa sua*, a rent charge or a rent seck, doth pass, 14 E. 4. 4. 11 H. 6. 22.

*Recuperare, i. ad rem per injuriam extorri' sive detentam per sententiam Judicis restitui.*

Execution is the obtaining of actuall possession of any thing acquired by Judgement of Law, or by a Fine executory levied, whether it be by Sheriiff, or by the entry of the party, *vide Sect.* 504.

If the Recovery in Assize, &c. be had against one, and hee and another redisseise the Plaintiff, he shall not have a Redisseisin; for he is *alius*, and hee cannot have a Redisseisin against the former disseisor a'one, becau' he is joynt-tenant with another. For joynt tenancy in a Writ of Redisseisin, is a good plea, and a stranger shall not be subject to double imprisonment and double damages, 33 E. 3 *Redisse. si.* 7. 9 H. 4. 5. *F. N. B.* 118. c.

A Redisseisin doth lye against the disseisor which doth redisseise, and his feoffee after the second disseisin, for otherwise the redisseisor might prevent the Plaintiff of his redisseisin.

If the Mesne recovereth a rent when it is a rent service, and after the rent becommeth a rent seck by surplusage, and doth redisseise him of the rent, hee shall have a redisseisin; for the substance of the rent remains, though the quality be altered.

*Sect.* 234.

295. He that is of a Jury, must be liber & legalis homo. 9. E. 4. 16. First hee ought to be dwelling most neare to the place where the question is moved. 2. He ought to be most sufficient both for understanding, and competency of estate. 3. To bee least suspicious, that is, to be indifferent as he stands unworn. *Vide S.* 102. 193. *Ad questionem facti non respondent Indices. Ad questio juris non respondent lutores.* Calumniare to chal.

challenge, *i. e.* to except against them in Court that are returned to be Jurors. Fo. 155. b.

It is most necessary, that Jurors be *omni exceptione maiores*; forasmuch as mens lives, &c. are to be tried by them.

*Nota*, that there is a principall cause of challenge to the array, and a challenge to the favour, *Fol. 156. a. Vide & nota.*

The challenge to the array is in respect to the cause of indifference or default in the Sheriff, or other officer that made the returne, and not in respect of the persons returned, where there is no default in the Sheriff, &c. for if the challenge to the array, be found against the party that takes it, yet he shall have his particular challenge to the Polls, that is to the particular persons; and these be of four kinds, *i. e.* peremptory, principall, which induce favour, and for default of hundredors, *fo. 156. b.*

A man may challenge peremptorily, without shewing any cause, and this only is in case of Felony, &c. *In favorem vita. Vide, &c.*

Principall challenges to the Poll may be reduced to foure heads. 1. *Propter honoris respectum*, as no Peer of the realme is to be sworn on Juries, *l. 6. 52.*

2. *Propter defectum, patrie, libertatis, liberi tenementi; Hundredorum*, for vicini vicinorum facta prasumuntur scire.

3. *Propter affectum*; and this is either working a principall challenge, or to the favour, and again a principall challenge is either by judgement of Law without any act of his, as if the Juror be of bloud or kindred to either party, *Bris. f. 135.* if the Juror have part of the Land that dependeth upon the same title, *Braff. fo. 18*

If a witnesse named in the Deed be returned of the Jury, &c. *f. 23. Ass. 11. Fo. 157. a. Vide & nota.* Or upon his own act, as if the Juror had given a verdict before, for the same cause, albeit it be reversed by Writ of error, or if after verdict Judgement were arrested. So if he hath given a former verdict upon the same title or matter though between other persons. *8 H. 5. 10. 18. E. 4. 12. 21. E. 4. 74. fo. 157. b. Vide, &c.*

If a Juror hath been an arbitrator chosen by the plaintiff

or defendant in the same cause, and have been informed of or treated of the matter, this is a principall challenge. 9. E. 4. 46. But a Commissioner chosen by one of the parties for examination of witnesses, &c. may upon cause be challenged to favour. 1. 9. fo. 71. *Peacock's Case*.

Challenge concluding to the favour must be left to the conscience of the triors, &c. As if the Juror bee of kindred, or under the distresse of him in the reversion or remainder, or in whose right the Avowry or justification is made, &c.

These be no principall challenges, because he in reversions, &c. is not party to the Record. otherwise it is if they were made parties by Aide, Rescepit, or voucher, and yet the cause of favour is apparant; so it is of all principall causes if they were party to the Record. 10. E. 4. 12. *vide*, &c.

(4) 4. *Propter delictum*, as if the Juror be attainted or convicted of treason or felony, &c. for *repellitur a sacramento infamis*. So it is if a man be outlawed in trespassse, &c. *Mirror. cap. 3. d'attaint. Fol. 158. a. Vide*, &c.

*Nota*, the array of the Tales shall not be chal'enged by any one parry, unrill the array of the principall be tried; but if the plaintiff challenge the array of the principall, the defendant may challenge the array of the Tales, (and there the one of the principall, and the other of the Tales, shall try both arrayes) after one hath taken a challenge to the Poll, hee cannot challenge the array. 9. E. 4. 27. 9. H. 5. 11.

If a pannell upon a *ven. fac.* be returned, and a Tales; and the array of the principall is challenged, the Triors which try and quash the array, shall not try the Array of the Tales; for now it is as if there had been no appearance of the principall pannell; but if the triors affirm the array of the principall, then they shall try the array of the Tales. 9. E. 4. 46. 7. E. 6. *Dyer*. 78. When any challenge is made to the Polls, two triors shall be appointed by the Court, and if they try one indifferent, and he be sworne, then hee and the two triors shall try another, and if another bee tried indifferent, and he be sworne, then the two triors cease, and the two that be sworne in the Jury shall try the rest. 22. E. 4. *Chal.* 61. 62.

If the plaintiffe challenge ten, and the defendant one, and the twelfth is sworne, because one cannot try alone, there shall be added unto him one challenged by the plaintiffe, and the other by the defendant. 7. H. 4. 41. If the cause of challenge touch the dishonour or discredit of the Juror, he shall not be examined upon his oath, but in other cases he shall be examined upon his oath to informe the triors. 49. E. 3. 1. 2.

*Fems ne serfs, ne enfans, ne nul infamys, ne nulque nē fise tenant, ne poet estr. bone summonere. Brit. ca. 121. Vide libr. Fo. 158. b.*

Of an Ass. of no disseim *Vide l. 8. f. 45. Iohn Webbs case.*

Whensoever a Statute giveth a forfeiture or penalty against him which wrongfully detaineth, or dispossesseth another of his duty or interest, in that case he that hath the wrong shall have the forfeiture, &c. and not the King. P. 29. *Eliz.* between the Queen and Wood, and so it was adjudged, &c. M. 4. 1a. Re. and note, that the Act of Parliament doth give a temporall remedy at the Common Law to Parsons, &c. for an ecclesiasticall duty, and to laymen proprietaries of tithes the like remedy, but they have election either to sue for the treble value at the Common Law, or for the double value in the Ecclesiasticall Court, or for subtraction of tithes there also. *Vide & nota 159. a. &c. 2. E. 6. ca. 13. Donec treble value at party grieve p. pradiall dismes detainē per sort, &c.*

*Señ. 235. 236.*

Payment of any money (or of any valuable thing) in the name of seisin of a rent seck, before any rent become due, is a good seisin of the rent. to have an Ass. (of no disseis.) when it is due, and that which is given in the name of seif. &c. worketh his effect to give seisin, and yet it is no part of the rent, nor shall be abated out of the rent. S. 565.

The grant and delivery of the Deede (and attornment) is no seisin of the rent: and a seisin in Law which the grantee hath by the grant, is not sufficient to maintaine an Ass. or any other reall action, but there must bee an actuall seisin. *Fo. 160. a.*



Also of a rent seck (and so it is of a rent charge) home poit aver ass. de mortd. ou Bre. de Ayel, ou de Cosnag. & tous autres manners d'actions reals, come la case gift, sicome i poet aũ desc' auter rent.

Hereupon some have gathered, that a man shall have a Writ of right of a rent seck, or of a rent charge, albeit they be against common right. F. N. B. 6. 14. E. 4, 5.

Seck. 237.

*Sont 3. causes de disseisine de rent service sc. rescous. replevin. & inclosure, car per tiels choses le Seignior e disturbe de le meane per que il doit aũ & vener a son rent, sc. de le distresse.*

But you may make six disseisins of a rent service: Rescous of a distresse, resistance to distrein, Repl. inclos. counter pleading of the title, and vouching of a Record and sailing. Fo. 160. b.

In some cases the Tenant may make Rescous, &c. 1. if no rent be behind when the distreis is taken. 2. If the Tenant tender the rent to the Lord, when he is to take the distresse, and yet the Lord will distreine, &c. 3. If the rent be behind, and the Lord distreine the Cattell of the Tenant in the high way within his Fee. 4. If the Lord will distreine, *averia Carura*, where there is a sufficient, &c. to be taken beside.

5. If the Lord coming to distreine had no view of the Cattell within his Fee, though the Tenant drive them off purposely, or if the Cattell of themselves after the view goe out of the Fee, or if the Tenant after the view remove them for any other cause, than to prevent the Lord of his distresse. In all these cases if the Lord distreine the Tenant may make rescous. *Vide les autorities en ceux cases* (1.) 6. E. 4. 11. b. F. N. B. 102. E. Lib. 4. f. 11. Beuills c. 8. H. 4. 1. (2) 17 E. 3. 43. Rescous 14.

If a man come to distreing for dammage feasant, and see the beasts in his soile, and the owner chase them out of purpose before the distresse taken, if the owner of the Soile distreine them, the owner of the cattell may rescue them, for the

the beasts must be damage feasant at the time of the distress. 16. E. 4. 10. Lib. 9. fo. 22. in case de avowrie.

There is a diversity between a Warrant of Record, and a warr. or an Authority in Law; for if a *Capias* be awarded to the Sherlff to arrest a man for felony, albeit the party be innocent, yet cannot he make *rescous*. But if a Sherlff will by authority which the Law giveth him arrest any man for Felony which is not guilty, he may rescue himself. 14. H. 7. 20. tit. Just. de. peace 9.

To counterplead the Plaintiff in an Ass. by which he is delayed, maketh him that pleadeth it a disseisor. Otherwise it is if he had pleaded *nul tort*, &c. 24. Ass. 3. 29. Ass. 52. Brit. Fo. 108.

If any man be disturbed to enter and manure his Land, this is a disseisin of the Land it self: for *qui adimit medium dirimit finem; & qui obstruit aditum destruit commodum*. 26. Ass. 17. 3 E. 4. 2. par Littleton.

Sont 4. *causes de disseisin de rent charge* sc. *Rescous*, *replevin*, *enclosure*, & *denier*. and you may adde a Fifth, or, resistance to distreine, counterpleading, and vouching a Record and failer thereof.

Deniall is a disseisin of a rent charge as well as of a rent seck, albeit he may distreine for the rent charge as well as for rent service. *Nota.* that when Bookes say that detainer of a rent charge or seck is a disseisin, it must be intended upon a demand made, 14. E. 4. 4. Et Sont 2. *causes de disseisin de rent seck*, viz. *denier* & *inclosure*.

Señ. 240.

*Maxime paci sunt contraria vis & injuria.*

*Omnes illos dicimus armatos qui habent cum quo nocere possunt, &c. Bract. Lib. 4. f. 162.*

*Armoi um appellatione non solum scuta & gladii & galeæ continentur, sed & fustes & lapides, as the Poet.*

*Jamque faces & saxa volant, furor arma ministrat. Virgilius 1. Aneid.*

*Sed vim vi repellere licet, modo fiat moderamine inculpare*

patre tutelæ, non ad sumendam vindictam, sed ad propulsandam injuriam. *Vide Sect. 589.* Where a disseisin shall be by way of admittance of the owner of the rent.

Since *Littletons* time a right profitable Statute 32. H. 8. ca. 37. hath beene made for the recovery of arrearages of rents in certaine cases, &c.

First, When *Littleton* wrote, the Heirs, Executors or Administrators of a man seised of a rent service, rent charge, rent seck, or fee same, in fee simple or fee taile, had no remedy for arrearages incurred in the life of the owner of such rents. But now a double remedy is given to the Executor or Administrator for payment of debts, &c. viz. either to distrain, or to have an action of Debt.

2. The preamble of the Statute concerning Executors or Administrators of Tenant for life, is to be intended of Tenant *pur auter vie*, so long as *Cestuy que vie* liveth, who are also holpen by the said double Remedy: but after the estate for life determined, his Executors or Administrators might have had an action of Debt by the Common Law, but they could not have distrained, which now they may, &c. l. 4. 49. *Ognels Case. Dyer 375.*

3. If a man make a lease for life or lives, or a gift in taile, reserving rent, this is a rent service within the Statute.

4. The action of debt must be brought against them that tooke the profits when the rents became arrere, or against their Executors or Administrators, but the distresse may bee taken upon the land, be it in the Tenants hands, or of any other that claimes by or from him; i. e. from, or under him by purchase, gift or descent, and not above him, as the Lord by Escheat claime, &c. by reason of his Seigniorie, which is a Title Paramount, l. 7. 39. *Lillingtons Case, 11. H. 4. 94.*

5. Lord and Tenant, rent is arrere, the Lord grants his Seigniorie, and dyeth, The Executor shall have no remedy for these arrearages, because the grantor himselfe had no remedy for them when he dyed, in respect of his grant; and the act is accordingly.

6. If the Tenant make a lease for life, remainder for life,  
remainder

remainder in fee, Tenant for life payes not the rent due to the Lord, the Lord dyeth, Tenant for life dyes, the Executor cannot distrain upon him in remainder, for he claimes not by descent by or from Tenant for life. And so it is of a Reversion.

But if a man grant a rent charge to A. for the life of B. and letterth the lands to C. for life, the remainder to D. in fee, the rent is arrear for divers yeares; B. dyeth, C dyeth, A. may distraine D. in remainder for all the arrearages, by the latter branch of the Statute, 22. H. 8. l. 5. 118. *Edridges Case*.

7. For the arrearage of a *Nom. Pane*, and for reliefe, or for *Aid pur faire fts Chivaler*, &c. This Statute giveth no remedy.

For arrearages of the *Nom. Pane*, the grantee or his Executor, &c. may have an action of Debt, for Relief the Lord must distrain, but his Executor by the Common Law shall have action of Debt, *W. 1. c. 36. F. N. B. 122.*

Note, all manner of arrearages of rents issuing out of a Freehold, or inheritance, whether they be in Money, or Corne, Cattle, &c. within the Statute; but worke dayes, or any corporall service, &c. are uot.

8. If a Feme sole seised of a rent in fee, taketh husband and dyeth; the husband by the Common Law should not have the arrearages due before marriage, but now the Statute giveth him remedy for the same. *L. 4. Ognels Case*.



## Liber Tertius.

### C A P. I.

#### Of Parceners.

Sec. 241.



Ur Author having treated in his two former Books, 1. Of Estates of Lands and Tenements; and in his second Book of Tenures whereby the same have been holden: Now in his third Book doth teach us divers things concerning both of them: as 1. the Qualities of their Estates. 2. In what cases the entry of him that Right hath may be taken away. 3. The Remedies, and in what Cases the same may be prevented or avoided. 4. How a man may be bartoed of his Right for ever, and in what Cases the same may be prevented or avoided, *vide lib. 8. & Nota*, fol. 163.

2 ou 3 *parceners* sont forsque un heire a lour Auncest; for albeit where there be two parceners, they have moities in the lands descended to them, yet are they both but one heire, *vid. S. 8. vers. fin.*

*Nota diversitat'* between a Descent, which is an act of the Law,

Law, and a Purchase, which is an act of the party. For if a man hath two daughters, &c. and one of them is attaint of Felony, the father dye h. the one moiety shall descend to the one daughter, and the other shall escheat. But if a man make a lease for life, the remainder to the right heirs of A. being dead, who hath issue two daughters, and one is attainted, &c. the remainder is void for the whole, for that both the daughters should have been but one heir. *Fleta l. 5. c. 9. & l. 6. c. 47. fol. 164. a. vide & qu.*

*Sunt autem plures participes quasi unum corpus in eo quod unum jus habent, & oportet quod corpus sit integrum & quod in nulla parte sit defectum.*

If lands be given to a man, and to the heirs females of his body, and he hath issue a Son and a Daughter, and dyeth, the Daughter shall have the land by descent; but if a remainder be limited to the heirs females of the body of I. S. &c. the daughter shall never take it by Purchase, for that shee is not heir female of the body of I. S. because he hath a Son. And when the right heir doth claim by purchase, he must be a compleat heir in judgement of Law.

13.

431.

And as they be but one heir, and yet severall persons, so have they one Free-hold in the land so long as it remains undivided in respect of any strangers *Præcipe*. But between themselves to many purposes they have in judgement of Law severall Free-holds, for the one of them may infeoff another of her part, and make livery, 10 E. 4. 17. E. 3. 46. fol. 164. a. vide & qu.

Note a diversity, *inter descensum in capita, & in stirpes.*

If a man hath issue two daughters, and dyeth, this descent is in *capita*, viz. that every shall inherit alike. But if a man hath issue two daughters, and the eldest daughter hath issue three daughters, and the yongest one daughter; all these four shall inherit, but the daughter of the yongest shall have as much as the three daughters of the eldest, *ratione stirpium*, and not *ratione capitum*, for every daughter hath a severall root, &c.

Men descending of daughters, may bee Coparceners as well as women, and shall joyntly implead and be impleaded.

Item est alia actio mixta, quæ dicitur actio Familiz hirciscunda, & locum habet inter eos qui communem habent hæredit' &c. Et locum habet, ut videtur, inter cohæredes, ubi agitur de pro parte sororum, vel inter alios ubi res inter partes & cohæredes dividi debeat sicut sunt plures sorores, quæ sunt quasi unus hæres, vel inter plures fratres, qui sunt quasi unus hæres ratione rei quæ divisibilis est inter plures masculos, &c. *Bract. l. 2. fol. 66. 71. &c. & l. 5. fol. 443. b. vide & qu.*

Sunt aliæ res hæreditariæ quæ veniunt in partitionem, quæ cum dividi non possunt conceduntur uni, ita quod aliæ cohæredes alibi de communi hæreditate habeant ad valorem, sicut sunt vivaria, Piscariæ, parci, vel saltem quod partem habeant pro defectu, sicut secundum piscem, tertium, vel quartum, vel secundum actum, tertium vel quartum retis. Item in parciis secundam, tertiam, aut quartam damam. *Bract. l. 2. 76. fo. 165. a.*

*Regnum non est divisibile.*

*Præterea sceptum Ilione quod gesserat olim*

*Maxima natarum Priami*—Virg. 1. *Æneid.*

If there be two Coparceners of certain lands with Warranty, and they make partition, &c. the Warranty shall remain, because they are compellable to make partition.

*Tho. de Eberston in Foresta de Pickering*, had kept time out of minde a Woodward for keeping of the Woods parcel of that Manor, and had the bark of all the Trees felled, &c. as belonging to his Manor; and this was adjudged a good prescription. *1 in. Pickr. 8 E. 3. Rot. 34.*

*Sect. 243, & 244, 245.*

If Coparceners make partition at full age, and unmarried, and of *sana memoria* of lands in fee simple, it is good and firm for ever, albeit the values be unequal; but if it be of lands intailed, &c. it shall binde the parties themselves, but  
not



not their issues unless it be equall. Or if any be Covert, it shall binde the husband, but not the wife or her heires. It shall not binde the Infant, &c. *Modus & conventio vincunt legem. Pacto aliquid licitum est, quod sine pacto non admittitur. Quilibet potest renunciare juri pro se introducto. Conventio autem privatorum non potest publico juri derogare.*

*Affineia* semper est preferenda propter privilegium aetatis, sed esto quod filia primogenita relicto nepote, vel nepte in vita patris vel matris decederis, preferenda erit soror antenata tali nepoti vel nepti quantum ad Ecclisiam quia mortem parentum expectant.

If there be divers Coparceners of an Advowson, and they cannot agree to present, the Law doth give the first presentment to the eldest, and this privilege shall descend to her issue, nay her Assigns shall have it, and so shall her husband that is tenant by the Courtlesse, &c. But it is otherwise of a partition in Deed by the act of the party. *Sic vide diversis fol. 166. b.*

*Cujus est divisio, alterius est electio.*

*Dedi vobis possessionem quam dividetis sorte. Numb. c. 26.*

Se<sup>t</sup>. 247.

If one Coparcener maketh a lease *pur ans.*, yet a Writ of Partition doth lie; but otherwise is it, if one or both make a lease for life, because *non in simul & pro indiviso tenent*, and the writ of Partition must be against the Tenant of the Freehold, 11 *H. 4. 3. F. N. B. 62. g.*

And if one Coparcener disseise another, a Writ of Partition doth not lie, &c. for that *non pro indiviso tenent*, &c. 4 *H. 7. 9. 11 Aff. 23.*

If two Coparceners have two Manors by descent, and they make partition, that the one shall have one Manor for one year, and the other the other Manor for this year, and so *alternis vicibus* to them and their heirs, this is a good partition, *Temps. E. 1. partit. 21. F. N. B. 62. 1.*

Of partitions in Law, some be by act in Law without Judgement, and some be by Judgement, and not in a Writ *de Partit. fac.*

If

If there be Lord, three Coparceners Mesnes, and Tenant, and one Coparcener purchase the Tenancy, this is not onely a partition of the Mesnalty, being extinct for a third part, but a division of the Seigniori Paramount, for now he must make severall Avowries, 26 H. 6. 7.

If one Coparcener make a Feoffment in fee of her part, this is a severance of the Coparcenary, and severall Writs of *Præcipe* shall lie against the other Coparcener, and the Feoffee, 37 H. 6. 8. So it is if two Coparceners have issue and dye, 17 E. 3. 15, & 16.

*Et si asc' des parceners sont enget ou disturbe de sa seisin per ses auters parceners, ou plusor, al disseisee viendrant ass. per se-veral pleint sur les parceners & recovera, mes nemy a tener en se-veralty, mes en common selonque ceo que avant le fist, &c.* Britton fol. 112. a. And this seemeth reasonable, for he must have Judgment according to his pleint, and that was of a moiety, and not of any thing in severalty; and the Sheriff cannot have any warrant to make any partition in severalty, or by Metes and Bounds. Lib. 6. fol. 12, & 13. *Morrices Case.*

*Señ. 248.*

Si parceners ne voilont agere a partition dest. fr. enter eux, donque lun poir aver brève partition fac. envers les auters, &c. & le vic. en son propter persona alera a les terres, &c. & per le serement de 12 loial homes de son bail, &c. il ferra partit. enter les parties, &c.

There is a book in the Exchequer, called Doms-day, *dies judicii. Sententia ejusdem libri inficiari non potest, vel impune declinari, ob hoc nos eundem librum judiciarum nominamus.*

Sheriffe is the Reve of the Shire, *Præfectus Satrapia, Provincia, or Comitatus, & habet triplicem custodiam, 1 Vita Legi, 2. Vita Reipublica. Vicecomes dicitur, quod vicem Comitatus suppleat. Marculphus saith, This Office is, Judiciaria Dignitas. Lampridius, That it is Officium Dignitatis. Forter saith, Quod Vicecomes est nobilis Officiarius. Fortesc. c. 34. R. 2. cap.*

Verum.

Verum quod modo vocatur Comitatus, olim apud Britones temporibus Romanorum in Regno isto Britan. vocabatur consulatus, & qui modo vocantur Vicecomites tunc temporis vice-consules vocabantur; ille verò dicebatur vice-consul qui consule absente ipsius vice supplebat in jure & in foro. *Lambert. fol. 129. 12.*

Bayliff is an Officer concerning the administration of Justice of a certain Province. *Flet. l. 2. c. 67.*

*Sett. 249, 250.*

*Et de la partition que l' vicount ad issint ft. il. fer. notice la Justices south son seale, & les seales de cheff de les 12. &c.* this &c. doth imply, That the principal Judgment upon the partition so returned, is, *Ideo consideratum est per Cur' quod partitio firma & stabilis in perpetuum teneatur.* Lib. 11. fol. 40. *Metcalfs Case.*

Partition per agreement per curer parceners poit estre, auxibien per parol sans fait, come per fait. But a partition between joint-tenants is not good without Deed, albeit it be of lands, and that they be compellable to make partition by the Statute of 31 H. 8. c. 10. and 32 H. 8. c. 32. because they must pursue that act by Writ *de Partit. fac.* And a partition between joyn-tenants without Writ, remains at the Common Law, which could not be done by Parol. And where books say, That joyn-tenants made partition without Deed, it must be intended of Tenants *en Common*. and executed by livery, *S. 290. 3 H. 4. l. lib. 6. 12, 13. 2 Eliz. Dyer 179. 28 H. 8. Dyer 29. 1, Mar. Dyer 98.*

*Nota*, between joyn-tenants there is a two fold privity, viz. in estate, and in possession; between tenants in common, there is a privity onely in possession, but parceners have a threefold privity, viz. in estate, in person, and in possession.

*Sett. 251, &c.*

A rent may be granted for owelty of partition without Deed. So it is of Common of Estovers, or a Corody, or a

L

COMMON

Common of Pasture, &c. albeit they lie in grant, &c. But if rent be granted out of other lands, then descended to the Coparceners, then there must be a Deed, 1 Mar. Dyer 18.

Seff. 253, &c.

*Mes tiel rent ē rent charge de common droit eroe & reserve pur equality de partit. Et nota, that Reservation here, is taken for a Grant.*

I. S. seised of lands in fee, hath issue two daughters, R and A. Bastard eigne, and Mulier puisne, and dyeth, R. and A. enter and make partition: A. and her daughter are concluded for ever, 21 E. 3. 34, 35. 11 Aff. 23.

Seff. 256, 257, 358.

2 parceners prent Bafons, si parit. fait perenter eux \* soit e-gall &c. dunque il ne poit estre apurs defeater, &c.

*Judicicis officium est, ut res ita tempera rerum*

*Quarere, quasito tempore tutius eris.*

An unequall partition in the Chancery, shall not bind an Infant, F.N.B. 256, 259, 260, &c. But it may be avoyded either by Scire fac. in the Chancery, or by a Writ de partit. fac. at the Common Law, 21 E. 3. 31.

A partition made by the Kings Writ de partit. fac. by the Sheriff by the Oath of 12 men, and Judgement thereupon given, shall binde the Infant, though his part be unequal, causa qua supra, fo. 171.

Seff. 259.

Si asc' fait, seoffment, grant, release, confirmation, obligation, ou auter escript' soit fait per asc' devant son plein age sc. 21 ans ou si asc' deins tiel age soit Bayliff ou receivor a asc' home, tout sera pur nient, &c. Auxi home devant le dit age ne sera my jure en Enquest, &c.

Fait, is an instrument consisting on three things; viz. Writing, Sealing, and Delivery, comprehending a Bargain, or Contract between party and party, man or woman.

Obliga-

Obligation, is commonly taken in the Common Law for a Bond containing a penalty with condition for payment of Money, or to do or suffer some act or thing, &c. And a Bill is most commonly taken for a single Bond without condition, f. 171. a. 271.

An Infant may binde himself to pay for his necessary Meat, Drink, Apparel, necessary Physick, &c. and likewise for his good teaching, and instruction, whereby he may profit himself afterwards. But if he binde himself in an Obligation or other Writing, with a penalty for the payment of any of these, that Obligation shall not binde him, 18 E. 4. 2. lib. 9. fol. 87. *Pinchons* case.

Also other things of necessity shall binde him, as a presentation to a Benefice, for otherwise the laps shall incur against him. And if an Infant be Executor upon payment of any debts due to the Testator, he may make an Acquittance, but in that case a Release without payment is voyd, and generally whatsoever an Infant is bound to doe by Law, the same shall binde him, albeit he doth it without sute of Law. 2 *M. Dyer* 104.

An action of account doth lie against a Bayliff that hath administration and charge of lands, goods, &c. for the profits which he hath raised or made, or might by his industry or care have reasonably raised, or made (his reasonable charges and expences deducted) *Brit. fol. 62. 70. 41 E. 3. 39.* 324.

An Account against a Receiver, is when one receiveth money to the use of another, to render an account, but upon his account he shall not be allowed his expences and charges: Except in some cases; As if two joynt Merchants occupy their Stock, &c. in common; one of them naming himself a Merchant, shall have an account against the other naming him a Merchant, and shall charge him as *Recep ot denariorum ipsius B. ex quacunque causa & contractu ad communem utilitatem ipsorum A. & B. provenientes sicut per legem mercatoriam rationabiliter monstrare potuit*, 43 E. 3. 31. 30 E. 1. Account 127. 10 H. 7. 16. lib. Intrat. 17, 18, 19. F. N. B. 118. 324.

So as there be but three kindes of Writs of Account, viz.  
 1. Against one as Guardian. 2. Against one as Bayliff. And  
 3. as Receiver, *F. N. B.* 219. d.

And to maintain an action of account, there must be either a privity in deed by the consent of the party, 2 *Mar. B. Account* 89. *F. N. B.* 117. *Pl. Com.* 342. 2 *H.* 4. 12. 4 *H.* 7. 6, &c. or a privity in law *ex provisione legis*, as against a Guardian, &c..

*Minor furare non potest. Brañ. l. 5. f. 340. b.* For an infant cannot make his Law of Non-Summons, 13 *E.* 3. *Ley* 50. and therefore the default shall not prejudice him. 2 *Mar.* *Dyer.* 104. 105. But an infant of the age of 12 yeares shall take the oath of allegiance, &c. *Vide Sect.* 85. 91.

An infant cannot upon his oath make his Law in an action of debt, 1 *H.* 7. 25. 15 *E.* 4. 2. and the husband and wife of full age for the debt of the wife, before the converture shall make their Law. 9 *E.* 4. 24. 15 *E.* 4. 2.

Grant is a conveyance of a thing which cannot pass without Deed, as advowsons, rents, &c. *Lib.* 3 f. 63. *Lincol. Coll.* 6.

*Sect.* 260, 261.

The reversion expectant upon an estate taile is of no account in Law, for that it may be cut off by the Tenant in Taile. *Tres. in fee S. and fee Taile* descend al 2. files, &c.

If the youngest daughter alien part of the Lands in Fee simple and dyeth, so as a full recompence for the lands entailed descends not to her issue, she may waive the taking of any profits thereof, and enter into the Land entailed, for the issue in taile shall never be barred without a full recompence, though there be a warr. in Deed, or in Law descended. *Pl.* 173. a.

If a man be seised of three Manors of equall value in Fee and taketh wife, and chargeth one of the Manors with a rent charge, and dyeth, she may by the provision of the Law take a third part of all the Manor and hold them discharged, but if she will accept the entire Manor charged, it is holden that she shall hold it so. 26 *E.* 3. *Dower* 133. 18. *H.* 6. 17.

Appl

A partition of lands intailed between perceners, if it be equall at the time of the partition shall bind the issues in taile for ever, albeit the one doe alien her part. *Dycr 1. Mar. 98.*

*Seff. 262.*

When the privity of the estate is destroyed by the Feoff. of one parcener, upon eviction of a moiety by force of an entaile against the other, she shall not enter upon the alienee. But in the case that *Littleton* putteth of disseisin of an Infant, &c. when the privity of the estate remaineth, and the part of one is evicted, she shall enter and hold in Coparcenary with her other coparcener, and so it is in the case of an exchange. *15. E. 4. 3. a. per. Littleton Lib. 4. 221, &c. Bastards c.*

If the whole estate in part of the property be evicted, that shall avoid the partition in the whole, be it of a Manor that is entire, or of acres of ground, &c. that be severall; for the partition in that case implyeth for this purpose both a warr. and a condition in Law, and either of them is entire, and giveth an entry in this case into the whole. *13. E. 4. 3. 42. Ass. 22. & Lib. 4. ante, &c.*

Also if any estate of freehold be evicted from the Coparcener in all, or part of her property, it shall be avoided in the whole. *vide. libr. & nota Fo. 170. a, ex grat.*

If but part &c. be evicted, as an estate in taile, or for life, leaving a reversion in the Coparcener.

Where one Coparcener taketh benefit of the condition in Law she defeateth the partition in the whole. But when she vouched by force of the warr. in Law for part, the partition shall not be defeated in the whole, but she shall recompence for that part *Sic nota diversit. 3 E. 3. Tit. Voucher 249.*

Also; there is another diversity between a recovery in value by force of the warranty upon the exchange & upon the partition, for upon the exchange he shall recover a full recompence for all that he loseth: but upon the partition she shall recover but the moiety or halfe of that which is lost, to the end that the losse may be equall. There are more and



greater privities in case of partition in persons, bloud, and estates, than there is in exchanges, 19. H. 6. 26. 18. E. 2. t. aid. 171.

When the whole Privity between Coparceners is destroyed, there ceaseth any recompence to be expected either upon the condition in Law, or warranty in Law (by force of the partition) Fo. 174. a.

If one coparcener maketh a Feoffment in Fee, and after her Feoffee is impleaded, and voucheth the Feoffer, she may have aid of her coparcener to deraign a Warrant Paramount, but never to recover *pro rata* against her by force of the warrant in law upon the partition, for by her alienation she hath dismissed her self to have any part of the land, as Parcener. And as parcener she must recover *pro rata*, &c. 31. E. 3. 24. 11. H. 4. 22, 23. And yet in some case the Feoffee of one coparcener shall have aid, &c. and therefore if there be two coparceners, and they make partition, and the one of them infeoffs her Son and Heir apparent, and dyeth, the Son is impleaded, he shall pray in aid, &c. for that the warranty between the Mother and the Son is by Law adnulled, and therefore the Law giveth the Son, albeith he be in by Feoffment, to pray in aid of the other parcener to deraign the Warrant Paramount: wherein note the great Equity of the Common Law, 43. E. 3. 23. Pl. Com. 32. E. 1. tit. Aid 178.

But if a man be seised of lands in fee, and hath issue two daughters, and make a gift in tail to one of them, and dye seised of the Reversion in fee which descends to both Sisters, and the Donee of her issue is impleaded, she shall not pray in aid, &c. either to recover *pro rata* or to deraign the Warrant, &c. for that the other Sister is a stranger to the State tail, whereof the eldest was sole tenant, and never partition was or could be thereof made, 2 H. 6. 16.

Albeit it is in the power of the Tenant tail to cut off the Reversion: yet if the Infant enter before it be cut off, the Law hath such Consideration of this Reversion, that she that loseth it shall enter into her Sisters part, and hold with her in Coparcenery; for that the privity between them was not wholly destroyed.

Sect. 263, 264.

*Si le part dn parcener soit defeat per loial entre, &c. el poit enter & occupier ouesq; les auter parceners, &c. & eux compeller de faire novell partition, &c.*

*Breve de partit, fac. gift pur parceners tantsolement. Et ciel breve gift envers tenant per le curt' & encore il men ne poit au tiel breve.*

Albeit that the Tenant by the Curtesie be an estranger in blood, yet the Writ *de partit. fac.* clearly lies against the Tenant *per Curtesie*, because he continueth the state of Coparcenery, 3. E. 3. 47.

Also if two Coparceners be, and one doth alien in fee, they are Tenants in Common, and severall Writs of *Præcipe* must be brought against them; and yet the parcener shall have a Writ of partition against the alienee at the Common law, 28 E. 3. 5.

If there be three Coparceners, and the eldest taketh husband, and the husband purchase the part of the yongest, he and his wife shall have a Writ of Partition against the middle Sister at the Common Law, because he is seised of one part in the right of his wife who is a parcener, Dyer 1 Mar. 98. F. N. B. 52, Regist.

Since Littleton wrote, by the Statute 31 H. 8. c. 1. 32 H. 8. cap. 32. vide Sect. 290. one joynt-tenant, or tenant in common, may have a Writ of Partition against the other, and therefore the alienee of one parcener may have a Writ of Partition against the other parcener, because they are Tenants in common.

So Tenant *per Curtesie* shall have a Writ, &c. upon the Statute, for albeit he is neither joynt-tenant nor tenant in common, for that a *Præcipe* lyeth against the parcener and tenant *per Curtesie*, yer he is in equall mischief as another tenant for life. Br. tit. Partit. 141. Dyer 3 M. 128. A. & 7 Eliz. 243.

## CHAP. II.

*Parceners by Custome.*

Sect. 265, &amp;c.

**P**arcenery per le Custome est lou terres discend a les fits en Gavelkind, &c. & in Wallia, hereditas partibilis est inter heredes masculos. Sect. 212. Stat. Wall. 12 E. 1.

Sons are parceners in respect of the Custom of the fee or inheritance, and not in respect of their person, as Daughters and Sisters, &c. be *Bracton* l. 5. fo. 428.

*Hotchpot*, est de mitt. les terres leigne soer en frankmarriage, & les terres del auter soer en fee simple ensemble, & donques par-tit, serre fert, &c. Vide Sect. 6. 266. &c.

There must be a Custom alleaged in some County, &c. to inable the wife or children to the Writ *de rationabile parte bonorum*, Regist. 142. 34 E. 1. Detin. 56. 7 E. 4. 21.

But such as be reasonably advanced by the Father, &c. shall have no further part of the goods; for the words of the Writ be, *Nec in vita patris promoti fuerunt*. 3 E. 3. Detin. 156. 40 E. 3. 18. fo. 176. b. vide & nota.

Sect. 268. and 269.

After this putting into Hotchpot, and partition made, the lands given in Frankmarriage, are become as the other lands which are descended from the common Ancestor; and of these lands if she be impleaded, she shall have aid, &c. So if he Coparcener that hath a rent granted to her for owelty of artition, hath the rent, as if it had descended to her, &c. *Brit. cap. 72.* 10 E. 3. 37. 29 *Ass.* 23.

Et tout foits sur tiel partit les terres dones en frankmarriage demurgent a les Donees, & a lour heires solonque le forme de le done. Car l'auter parcenter navoit riens de ceo, &c. vide lib. fo. 177. b.

Quod

Quod est inconueniens, aut contra rationem, non est permissum in lege.

Señ. 271, 272, 273.

Dones en frankmarriage fueront per la common ley deu~~er~~ left. west. 2. & tout temps puis ad este continue, &c.

The gifts doe continue, but not the estates, 12 H. 4. 11.

Item tiel mitter en Hotchpot, &c. est lou les auters terres ou tenements que ne fuer? Dones en frankmarriage descend de les Donors en frankmarriage rousollement, &c.

Si les terres dones in frankmarriage sont de tant egall va. pur le an. que le remnant sont ou de plus value en vaine tiels tres, &c. ser. mis en Hotchpot, &c.

Lex non præcipit inutilia, inutilis labor stultus.

The Law shall adidge of the value, as it was at the time of the partition, fo. 179. a. *vide & nota*, unless the land be improved or decayd by the proper act or default of the parties.

Señ. 174, &c.

*Nota*, que terres ne ser. mis, &c. forsque ou ils descend en fee simple car de terres descendus en fee taile partit. serra fait sicome nul tiel done en frankmarriage ad este fait; for the issue claimeth per formam doni, & voluntas donatoris, &c. observetur.

If the Ancestor infeoffe one of his daughters of part of his land, or purchase lands to him and her, and their heires, or giueth her part of his lands in taile, yet she shall have a full part of the remnant of the lands in fee simple, for the benefit of purting, &c. into Hotchpot, is only appropriate to a gift in frankmarriage (*quia maritadium cadit in partem*) which shall be accounted as parcell of her advancement, 13 E. 2. tit. Tail. Bract. l. 2. fo. 77.

Señ. 276.

*Nota*, that *modus & convent' uicunt legem; & consensus tollit errorem*. But if partition be by the Kings Writ, then every parcener must have his part, 24 H. 3. tit. partit. 19.

## CHAP. III.

## Of Joynt-tenants

Sect. 277.

There be joynt-tenants by other Conveyances than Littleton here mentioneth; as by Fine, Recovery, Bargain and Sale, Release, Confirmation, &c. So there be divers other limitations, &c. As if a rent charge be granted to A. and B. *habendum* to them two, *viz.* to A. untill he be married, and to B. untill he be advanced to a Benefice, they be joynt-tenants in the meane time, &c. And if A. dye before marriage, the rent shall survive; but if A. had married, the rent should have ceased for a moiety: & *sicè converso*, on the other side.

If an alien and a subject purchase lands in fee, they are joynt-tenants, and the survivorship shall hold place; *Et nullum tempus occurrit regi* upon an office found, 7 E. 4. 29. 11. H. 4. 26.

I

Sect. 278.

*Omnis rati-habitio retrahitur & mandato equiparatur.*

Nota, That seeing Coadjutors, Counsellors, Commanders, &c. are all disseisors, albeit the disseisor which is tenant dyeth, yet the Affize lieth against the Coadjutor, &c. and tenant of the land, though he be no disseisor.

The Demandant and others in a *præcipe* did disseise the tenant to the use of the others, and the Writ did not abate, for the Demandant was a disseisor, but gained no tenancy in the land, for that he was but a Coadjutor, 50. E. 3. 2.

A man disseised tenant for life to the use of him in the reversion, and after he in the reversion agreeth, &c. he is a disseisor in fee, for by the disseisin the reversion was divested which

which (some say) cannot be revested by the agreement of him in the reversion, for that it maketh him a wrong doer, and therefore no relation of an estate by wrong can help him.

## Sect. 27.9

*Disseisin est properment lou un home enter eu asc' terres, &c. 161.  
lou son entre nem pas congeable & ousta celuy que ad frankte- 302.  
nement, &c. This description, &c. is understood onely of such  
lands, &c. whereinto an entry may be made, and not of Rents,  
Commons, &c.*

Every entry is no disseisin, unless there be an ouster also of the free hold; as an Entry and a Claimer or taking of Profits, &c. 3 E.4. 2. 34 Aff. 11. 12. Pl. Com. 89. Parson de Honeylane.

Now as there be joynt-tenants by Disseisin, so are there joynt-tenants by Abatement, Intrusion, and Vsurpation.

## Sect. 280.

*Nota que le nature de joyntenancy est, que le survivor aña solement l'entier tenancy solun que tiel estate que il ad, si le jointure soit continue, &c. mes autrement est de parceners.*

Although survivorship be proper to joynt-tenants, yet it is not proper *quarto modo*: for if a man letteth lands to A. and B. during the life of A. if B. dyeth, A. shall have all by the survivor, but if A. dyeth, B. shall have nothing.

Two or more may have trust or authority committed to them joyntly, and yet it shall not survive. But with a diversity between a naked Trust, &c. and a Trust joynted to an estate or interest. 2. There is a diversity between Authorities created by the party for private causes, and Authority created by Law for execution of Justice, *Ex gr.* 117. 274. 283.

As if a man devise that his two Executors shall sell his land, if one of them dye, the survivor shall not sell it, but if he had devised his lands to his Executors to be sold, there the survivor shall sell it, 39. Aff. p. 17. 30 H.8. tit. Devise B. 31 Dyer. 3 El. 190. Br. tit. Cond. 199. 246.

If a man make a Letter of Atturney to two to doe any act, the survivor shall not doe it: But if a Venire fac. be awarded to four Coroners to impanel and return a Jury, and one of them dye, yet the other shall execute and return the same.

If a Charter of Feoffment be made, and a Letter of Atturney to four or three joyntly or severally to deliver seisin, two of them cannot make livery, because it is neither by them four or three joyntly, nor any of them severally, 38 H. 8. Dyer 62 27 H. 8. f. 6.

But if the Sheriff upon a Capias directed to him, make a Warrant to four or three joyntly or severally, to arrest the Defendant, two of them may arrest him, because it is for the execution of Justice, which is *pro bono publico*. Pasch. 45 Eliz. in Banco Reg. inter King & Hobbes. (Not of that kind of the infidel of Malmsbury)

Sett. 281, 282.

189. Survivor holdeth place regularly as well between joynt-tenants of goods and chattels in possession or in right, as of Inheritance or Free hold. fo. 182. a.

Si un obligation soit f. a plusieurs pur un debt celuy que sur-vequist avera tout le debt ou duty, & issent est daveris Covenants & Contracts, &c. Mes, Jus acerescendi inter mercatores pro beneficio commercii locum non habet, F.N.B. 117.E.30. E.37.

Sett. 283.

Terres sont dones a 2. homes, & a les heires de lour 2. corps engendres, en cen case les donees ont joint este pur lour 2. vies, & encore ils ont severall inheritances entant que ils ne poient aver per nul possibility un heire enter eux engendre, sicome home & feme point aver, &c.

Note, albeit they have severall inheritances in taile, and a particular estate for their lives, yet the inheritance doth not execute, and so break the joynt-tenancy but they are joynt-tenants for life, and tenants in common of the inheritance in tail.

Here



Here a diversity is implied, when the state of inheritance is limited by one Conveyance, as in this case it is, there are no severall estates to drowne one in another: but when the states are divided into severall Conveyances, their particular estates are distinct, &c. and the one drownes the other. As if a lease be made to two men for terme of their lives, and after the lessor granteth the reversion to them two, and to the heirs of their two bodies, the joynture is severed, and they are tenants in common in possession; and it is further implied, that in this Case of *Littletons* there is no division between the estates for lives, and the severall inheritances, because they cannot convey away the inheritance after their decease, for it is divided onely in supposition of law, and to some purposes the inheritance is said to be executed, 12 E. 4. 2. b.

If a man make a lease for life, and after granteth the reversion to the tenant for life and to a stranger, and to their heires, they are not joynt-tenants of the reversion, but the reversion by act of law is executed for the one moiety in the tenant for life, and for the other moiety he holdeth it still for life, the reversion of that moiety to the grantee, 39 H. 6. 2. b.

And so it is if a man make a lease to two for their lives, and after granteth the reversion to one of them in fee, the joynture is severed, and the reversion is executed for the one moiety, and for the other moiety there is tenant for life, the reversion to the grantee. *Vide Westcotes Case, lib. 2. fo. 60, 61.*

If lessee for life granteth his estate to him in the reversion and to a stranger, the joynture is severed, and the reversion executed for the one moiety by the act of the Law, 7 H. 6.

If a man make a lease for life, and grant the reversion to two in fee, the lessee granteth his estate to one of them, they are not joynt-tenants of the reversion, for there is an execution of the estate for the one moiety, and an estate for life, the reversion to the other of the other moiety.

Si home voet leffer terre a un auter par fait, ou sans fait, nient fesant mention que estate il avoir, & fert livery, &c. en ceo cas le lesse ad estate pur tinere de sa vie.

Quælibet concessio fortissimè contra donatorem interpretanda est. Legis (autem) constructio non facit injuriam. *Pl. Com. in Throgmortons case.*

If a lease be made to two, *habendum*, to the one for life, the remainder to the other for life, this doth alter the generall indentment of the premises. *Et semper expressam facit cessare tacitum*, 30 H. 8. 11. *Joyntenans. Br. 53. Dyer fo. 361. Pl. Com. 100.*

*Nota*, where the grant is impossible to take effect according to the letter, there the Law shall make such a construction as the gift by possibility may take effect, *Benignæ faciendæ sunt interpretationes cartar. propter simplicitatem laicorum ut res magis valeat quam pereat*, fo. 183. b.

*Cognitio legis est copulata & complicata. Tunc unumquodque scire dicimur cum primam causam scire putamus: scire autem propriè est rem ratione & per causam cognoscere. Arist.*

¶ *Metap. Virg. 1. Georg.*

*Felix qui potuit rerum cognoscere causas.*

If a gift be made to two men, and the heirs of their two bodies begotten, the remainder to them two and their heirs, they are joynt-tenants for life, tenants in common of the estate taile, and joynt-tenants of the fee simple in remainder, for they are joynt purchasers of the fee simple, and the remainder in fee is a new created estate, but the reversion remaining in the Donor, or his heirs, is a part of his ancient fee simple, *Dyer 14 Eli. 309.*

~~S. H. 284.~~

*Lou terre ẽ done a. 2. females & a les heires de luy 2. corps ingendres.* It hath been said, that the husband, &c. should be Tenant pur le Curt' living the other sister, 17 E. 3. 51. 78. and that the issue of the one should recover the moiety in a Formedon, living the other sister, 44 E. 3. Taile 13. 7. H. 4. 16. Corbets c. l. i. fo. 8. 84. Mar. Dyer 145. But Littleton hath resolved this doubt, *Vid. fo. 183. a.*

If a man give lands to two men and one woman, and the heires of their three bodies begotten, they have severall inheritances. For the Law will never intend a possibility upon a possibility. Fo. 184. a.

Scff. 285.

If a fine be levied to two and to the heirs of one of them by force whereof he is seised, he that hath Fee dyeth, and after the joint-tenant for life dieth, and an estranger abates in this case the heir may either suppose the Fee simple executed, and have an Ass. of Mordant. *ou brieve de droit* : or he may have a *scire fac.* to execute the fine, or maintain a Writ of intrusion by which the heir supposeth that the Fee was not executed. 11 H. 4. 55. F. N. B. 196. and 219. and he shall term it a remainder; and yet when Land is given to two, and to the heirs of one of them, he in the remainder cannot grant away his Fee simple.

Scff. 286.

2 Jointenants de terre, &c. celui que survesquist clama & ad 186.  
la terre per le survivor, & nemy ad, ne poit de ceo clamer rien  
per discent de son compagnon, &c. Mes autrement est de parcerers, 201.  
&c. and the diversity is, for that the Survivor doth claime above the grant, &c. and the heir by discent under, &c.

If two joyntenants be of a terme, and the one of them grant to I. S. that if he pay to him 10. l. deut. Mich. that then he shall have his terme, the grantor dyeth before the day, I. S. payes the summe to his executor at the day, yet he shall not have the terme, but the survivor shall hold place, for it was but in nature of a communication, but if he had made a Lease for years to begin at Mich. it should have bound the Survivor. 14 H. 8. 22. Pl. Com. 263. b. Hales case. *Ius accrescendi præfertur oneribus, & alienatio rei præfertur juri accrescendi.*

If one joyntenant in Fee simple be indebted to the King, and dieth, no Extent shall be made upon the land in the hands of the Survivor. 40 Ass. 36. F. N. B. 149. Pl. Com. 321.

If a recovery be had against one joyntenant who dyeth before

fore execution, the Survivor shall not avoid this recovery; because that the right of the moiety is bound by it.

If one joynt-tenant in Fee take a Lease for years of a stranger *per ft. indent.* and dyeth, the Survivor shall not be bound by the conclusion, because he claims above it, &c.

If two joynt-tenants be in Fee, and the one make a Lease for years reserving a rent, and dyeth, the surviving Feoffee shall have the reversion by survivor, but not the rent, because he claimeth in from the first Feoffer which is paramount the rent. *Dyer M. 2. & 3. El. 187. Lib. 1. f. 96. and Lib. 6. fo. 78, 79.*

If one joynt-tenant granteth a rent charge out of his part, and after release to his joint companion, and dieth, he shall hold the land charged, because he claimeth not by the survivor, in as much as the rel' prevent. the same. *33 H. 6. 3. a. 9 El. Dyer 263. fo. 185. a.*

But all men agree, that if *A. B. and C.* be joynt-tenants in Fee, and *A.* charge his part, and then release to *B.* and his heires and dye, that the charge is good for ever; for *B.* cannot be in from the first Feoffer, because he hath a joynt companion at the time of the release made, and severall Writs of *præc.* must be brought against them. *37 H. 8. tit. alienation. Br. 3 l. 10 E. 4. 3. b.*

*Señ. 287*

*Jus accrescendi prefertur ultimæ voluntati.*

Although an instant, *est unum indivisible tempore quod non est tempus nec pars temporis, ad quod tamen partes temp. connectuntur,* and that *instans est finis unius temporis, & principium alterius:* yet in consideration of Law, there is a priority of time, in an instant, as here the survivor is preferred before the devise, which Littleton distinguisheth by these words, *post mortem, & per mortem.* *Pl. Com Fulmerstons case.*

Two femes ioynt-tenants of a Lease for years, one of them taketh husband, and dyeth, yet the terme shall survive; for though all chattels realls are given to the husband, if he survive, yet the survivor between the joynt-tenants is the elder Title, and after the marriage the feme continued sole possessed

seised, for if the husband dyeth, she shall have it, and not the executors of the husband, but otherwise it is of personall goods, fol. 185. b. vide &c.

*In primis autem debet quilibet qui testaverit, dominum suum de meliore re quam habuerit recognoscere, & postea ecclesiam de alia meliore, &c. Fleta, lib. 2. cap. 50.*

Seft. 188.

*Chest joint. est sei del terre que il tient joint. per my & per tout. & sic totum tenet & nihil tenet, sc. totum conjunctim, & nihil per se separatim; and albeit they are so seised, yet to divers purposes each of them hath but a right to a moiety, as to enfeoffe, give, or demise, or to forfeit or lose by default in a Proc. 40. Ass. 79. Brit. cap. 35.*

*A communi observantia non est recedendum.*

If two joyntenants be, and both they make a feoffment in Fee upon condition, and that for breach thereof one of them shall enter into the whole, yet he shall enter but into a moiety, because no more in judgment of Law passed from him; and so it is of a gift in taile, or a Lease for life, &c. *Pl. com. Brownings c.*

If two joyntenants make a feoffment in fee, and one of the feoffors die, the feoffee cannot plead a feoffment from the survivor of the whole, because each of them gave but his part, but otherwise it is on the part of the feoffees, 14 E. 4. 5. fol. 186. a.

Two joyntenants *de terres, &c.* And one of them by Deed indentured bargain and sell the Lands, and the other joyntenant dyeth, and then the Deed is inrolled, there shall passe but a moiety, 6 E. 6. Tit. *Faits inroll. 9. Br.*

Seft. 289.

*En grant de rent charge per joint. &c. les tenemens demurg. tous soits come ils fuer. adavat. sans ceo que asc' ad asc' drt. dan asc' parcel de les tenem. forsc. eux me. & les tenem. sont en tiel plite come ils fueront devant le charge &c. mes ou leas e ft. per un joint. a un aut. per terme de ans &c. maint. per force de lease, le lessee ad drt.*

*Art. en m. la terre se de tout ceo que a son lessor affiert, & d'at tce per force de lease durant son Terme. Fo. 186. b.*

If two joyntenants be of an Advowson, and the one present, &c. and his Clark is admitted and instituted, this in respect of the privity shall not put the other out of possession, but if that joyntenant that presenteth dyeth, it shall serve for a title in a *Qu. Imp.* brought by the survivor. 11 H. 4. 54. 10 E. 4. 94. 1 H. 7. 1. b. 9 *El. Dyer* 259. 6 E. 4. 10. b. *Dost. & St.* 116. F. N. B. 34. u. But yet if one jointenant or tenant in common present, or if they present severally, the ordinary may either admit or refuse, &c. such a presentee, unless he joyne in a presentation and after the six moneths he may present by *lapsa*. But if two coparceners be &c. and they cannot agree to present, the eldest shall present, and if her sister doth disturbe her, she shall have a *qu. imp.* and so shall the issue and the Assignee of the eldest, and yet he is tenant in common with the youngest, and so tenant *per* Curtesie of the eldest shall present. 38 H. 6. 9. 5 H. 5. 10. F. N. B. 34.

*Seet. 290.*

Jointenants (*sils violent*) <sup>*joignant*</sup> *Y faire partition, &c.*

But this partition must be by Deed. *Vide Seet. 249. 318.*

But jointenants for years may make partition without Deed 18 *Eliz.* 350. b. *Dyer*. Since *Littleton* wrote, joyntenants and tenants in common are compellable to make partition by writ Stat. 31 H. 8. c. 1. 32 H. 8. c. 32. *Seet. 264. 247. 259. F. N. B. 9. b. 62. b. lib. 6. Fo. 12, 13. Morris c.*

If one joyntenant or tenant in common disseise another, and the disseisee bring his Ass. for the moiety, though the plaintiffe prayeth it, yet no judgment shall be given to hold in severaltie, for then at the common Law there might have been by compulsion of Law a partition between Joyntenants and tenants in common, and by rule of Law the plaintiffe must have judgement according to his plaint or demand. 187. a.

*Seet. 291. &c.*

Baron & feme sont forsq. un person en ley. vir & uxor sunt quasi unica

*unica persona, quia caro una, & sanguis unus. Lib. 4. fo. 68. Tokers 140*  
c. Pl. com. 483. Nicholls ca.

If an estate be made to a man and a woman and their heirs before marriage, and after they marry the husband and wife have moities between them. If a Feoffment be made to a man and a woman, and their heirs with warranty, and they enter marry, and after are impleaded and vouch, and recover in vallew, moities shall not be between them; for though they were sole when the warranty was made, notwithstanding at the time when they recovered and had execution they were husband and wife, in which time they cannot take by moities. Fo. 187. b. *Vide, &c.*

A right of Action, and a right of entry may stand in jointure. *Vide S. ft. 302. F.N.B. 193. k.*

A right of action, or a bare right of entry cannot stand in jointure with a freehold or inheritance in possession; and therefore if the husband make a Feoffment of the moiety, this was a discontinu. of that moiety, and the other joyntenant remained in possession of the freehold and inheritance of the other moiety, which for the time was a severance of the jointure. Statute of 32 H. 8. ca. 1.

If two joyntenants be of a rent, and one of them disseise the tenant of the Land, this is a severance of the jointure for a time, for the moiety of the rent is suspended by unity of possession, and therefore cannot stand in jointure with the other moiety in possession, Pl. com. 419.

*Nihil de re accrescit ei, qui in re quando jus accresceret habet.* A State of Freehold cannot stand in jointure with a terme for years: nor a reversion upon a Freehold, with a Freehold and inheritance in possession. Neither can a seisin in the right of a politick capacity stand in jointure with seisin in a naturall capacity. 37 H. 8. 3 E. 4. 10. Fo. 188. a. *Vide, &c.*

In all cases where the joyntenants pursue one joynt remedy and the one is summoned and severed, and the other recover, he that is summoned, &c. shall enter with him: but where their remedies be severall, there the one shall not en-



ter with the other till both have recovered. *Littleton* cap. *Remitt.* the last case. If Lands be demised for life, the remainder to the right heirs of I. S. and of I. N. I. S. hath issue and dyeth, and after I. N. hath issue and dyeth, the issues are not joyntenants; for the one moiety vested at one time, and the other at another time. 24 E. 3. 29. And yet in some cases there may be joyntenants, and yet the estate may vest in them at severall times: As if a man make a Feoffment in Fee to the use of himselfe, and of such wife as he should afterwards marry, for termes of their lives, and after he taketh wife, &c. 11 El. Dyer. Brents &c.

## CHAP. IV.

## Of Tenants in Common.

Sect. 292.

**J**Oyntenants have the Lands by one joynt title, and in one right; but Tenants in Common by severall titles, or by one title and by severall rights, which is the reason that joyntenants have one joynt freehold, and Tenants in Com. have severall freeholds, only this property is common to them both, viz. that their occupation is individed, and neither of them knoweth his part in severall. *Vide Sect. 296.*

*Additio<sup>n</sup> probat minoritatem.*

If Lands be given to two Bishops (or to two Abbots) 10 have and to hold to them two and their successors; in respect of their severall capacities, albeit the words be joynt, yet the Law doth adjudge them to be severally seised. *Vide Sect. 200.* 7 H. 7. 9 b. 16 H. 7. 15. b. 10 E. 4. 16. b. Fo. 189. b. 190. a.

If a Corodie be granted to two men and their heirs, because the Corodie is uncertain and cannot be severed, it shall amount

mount to a severall grant to each of them one Corodie; for the persons be severall, and the Corody is personall.

Se<sup>ct</sup>. 297.

If Lands be given to J. Bishop of N. and and his successors, and to J. Overl. Doctor of D. and his heirs being one and the same person, he is Tenant in Common with himself, 13 Hen. 8. 14.

But our Authors rules doe not hold in Chattels realls, or personalls: for if a Lease for years be made, or a ward granted to an Abbot and a secular man, or to a Bishop and secular man, or if goods be granted to them, they are Joyntenants, because they take not in their politique capacity. An expresse estate controllis an implied estate. *Si homo sei de cert. terre infeoffe un aut. del moitie de m. la terre, &c.* Such a feoffment is good by parol without writing, and such an uncertain estate shall passe by livery, 21 E. 4. 22. b. 10 Eliz. Dyer 28. 33 H. 6. 5. a. vide Se<sup>ct</sup>. 299. fol. 190. b. quære &c.

Se<sup>ct</sup>. 301.

*Expressio eorum quæ tacite insunt nihil operatur.*

In case of Leases for life it is more beneficiall for the Lessor to have the joynture severed then to have it continue.

*Ubi eadem ratio, ibi idem jus esse debet, for, ratio est anima legis, & ratio potest allegari deficiente lege.* But it must be ratio vera & legalis & non apparens. Arg. à simili, is good in Law, sed similitudo legalis est casuum diversor. int. se collatorum similis ratio, Quod in uno similitum valet, valebit in altero, Dissimilitum dissimilis est ratio.

Se<sup>ct</sup>. 302.

Two joyntenants, si lun de eux lessa ceo que a luy assiert a un aut. pur terme de sa vie, per tiel Lease le franktenement ē sever de le Joynture, & per cest le reason le reversion que ē dependant sur in le franktenement ē sever del joynture & si lessor mor. vivant lessee pur vie le reversion discenda al heire del lessor, & nemy deviendra a lauter joynt. joyntenant per le survivor.

*Un frankement ne poit per nature de joynture estre annex a un reversion, &c. fol. 191. b. vide &c.*

If two joyntenants be of a Lease for 21 years, and the one letteth his part for certain years part of the terme, the joynture is severed and survivor holdeth not place, for a terme for a small number of years is as high an interest, as for many more years. *Hil. 18 Eliz. Com. Banco.*

If two joyntenants make a Lease for life reserving a rent to one of them, the rent shall enure to them both, because the reversion remains in joynture, unlesse the reservation be by Deed indenture, and then he onely to whom it is reserved shall have it. *fol. 192. a. que. 27 Hen. 8. 16. a. 7 E. 4. 25. vide lib. &c.*

And so it is if such a Lessee for life should surrender to one of them, it shall inure to them both, for that they have a joynt reversion. But if the Lessee grant his estate to one of them, no part of it shall inure to his companion, because for the moiety belonging to his companion, it is in esse in him to whom the grant is made, the reversion to the other in fee, *5 E. 4. 4. 38 H. 6. 24. b.*

*2 Joyntenants font lease pur vie remainder a son comp. in fee, ceo ẽ bon remainder de son moiety & al on comp.*

*Seft. 303.*

If the Joynture be severed at the time of the death of him that first deceased, the benefit of survivor is destroyed for ever, *vide 8. 291.*

Two joyntenants in fee, and the one letteth his part to another for the life of the lessor, and the lessor dyeth, some say that his part shall survive &c. for by his death the lease was determined; and others hold the contrary, for that at the time of his death the joynture was severed, for so long as he lived the lease continued. And secondly, that notwithstanding the act of any one of the joyntenants, there must be equall benefit of survivor, as to the freehold. But here if the other joyntenant had first died, there had been no benefit of survivor to the lessor without question, *fol. 194. Vide & nota.*

*Seft.*

## Sect. 304, 305.

If two joyntenants be of 20 acres, and the one make a feoffment of his part in 18 acres, the other cannot release his entire part, but only in two acres, for that the joynture is severed for the residue.

*Nota*, upon a Release that creates, or enlargeth an estate, or inures by way of *Mitter le estate*, a Rent may be reserved, but not upon a release that inureth by way of *Mitter le droit*, or which inures by way of Extinguishment, fol. 193. b. \*

Of a release inuring by way of *extinguishment* made to the husband, the wife shall take benefit, or to the wife, the husband shall take benefit. But otherwise it is of a Release which inures by way of *Mitter l'estate*. \* 10 E. 4. 3. b. 21 H. 6. 8. b. \*

*En ascun case un release vera de mitter tout le drent que il que fert le release ad celuy a que le release e fait. Vide S. 306. f. 194. a.*

An usurpation shall work a Remitter to one that hath a former Right, F. N. B. 35. Right and wrong cannot consist together, 194. a.

## Sect. 307.

*Eten asc' case un release vera per voy dextinguishment, & aydera le joyntenant a que le release ne suit fert &c. sicome un home soit disseisee, & le disseisor fait feoffment a 2. homes in fee, si le disseisee release per son fait a un des feoffees cel release vera a ambideux &c. pur ceo que les feoffees ont estate per le ley scil. per feoffment & nemy per tort fert a nulluy &c.*

The reason of the diversity between the disseisors and their feoffees, is for that the feoffees coming in by Title and Purchase, are intended in Law to have a Warranty (which is much esteemed in Law) and therefore lest the Warranty should be avoided, the Release shall inure to both the feoffees in favour of purchasers, and so the right and benefit of every one saved. And therefore in ancient time if the feoffee of a disseisor had continued in seisin quietly a year and a day, the entry of the disseisee had not been lawfull upon him, 20 H. 3. Ass. 432.

## Sect. 311.

Note, that in reall actions, and in actions also that are mixt with the personalty, Tenants in common shall sever, because they have severall Freeholds &c. *Come si 2 tenants in common sont disseisees, ils doivent aver 2. Ass. pur ceo que ils fueront seisees per several titles &c. Vide lib. fol. 195. b. Autrement est de joyntenants.*

## Sect. 313.

*Quant a suer des actions que touchant le realty, y sont diversities peventer parceners que sont eins per divers discents & tenants in common. Vide Sect. 241.*

## Sect. 314.

If two Tenants in common be, and they grant a rent of 20. s. per annum out of their land, the Grantee shall have two rents of 20. s. *Pl. Com. Hill and Granges Case, 171. vide Sect. 219.*

But if they two make a gift in taile, a lease for life, &c. reserving 20. s. rent to them and their heirs, they shall have but one 20. s. for they shall have no more then themselves reserved. And albeit the reservation of rents severable be in joynt words, yet in respect of the severall reversiones the law makes thereof a severance, *fol. 197. a*

*Lex spectat nature ordinem, vide Sect. 129. & lex neminem cogit ad vana seu inutilia, lib. 5. fol. 21.*

The law wils that in every case where a man is wronged and endamaged, that he shall have remedy.

*Aliquid conceditur, ne injuria remaneret impunita quod alias non concederetur, 31 E. 3. 35. 3 E. 3. 19. a.*

Tenants in common shall joyn in a *Qu. imp.* because the Presentation to the Advowson is entire, *5 H. 7. 8. 33 H. 6. 11. 6 E. 4. 10.*

Also Tenants in common of a Seigniorie shall joyn in a Writ of Right of Ward, and Ravishment of Ward for the body, because it is intire, *6 H. 4. 6, 7.*

If two Tenants in common be of the Wardship of the body, and one doth ravish the Ward, and the one Tenant in common releases to the Ravisher, this shall goe in benefit of the other Tenant in common, and he shall recover the whole, and the release shall not be any barre to him. And so it is if two Tenants in common be of an Advowson, and they bring a *Qu. imp.* and the one doth release, yet the other shall sue forth and recover the whole Presentment.

Two Tenants in common shall joyn in a Detinue of Charters, and if one be Nonsuit, the other shall recover.

It is said that Tenants in common shall joyn in a *Warr. Charta*, but sever in Voucher, 18 E.3. 56.

*Sec. 315.*

*Item Tenants in common averont un action joynt-tenement, & recoveront joynt-tenement leur damages, quant l'action est en le personalty, & nemy en le realty, &c.*

Note, a diversity between a Chatel in possession, and a personall chose in action belonging unto them: As if two Tenants in common be of land, and one doth atrespasse therein, of this action they are joyntenants, and the survivor shall hold place, 22 H. 6. 12. S. 319, 320.

But if two Tenants in common be of goods, as of an horse, &c. there if one dye his Executors shall be Tenant in common with the survivor, fol. 198. a.

If two Tenants in common be of an Advowson, and a stranger usurp, so as the right is turned to an action, and they bring a Writ of *Qu. imp.* which concerns the realty, the six months passe, and the one dyeth, the Writ shall not abate, but the survivor shall recover, otherwise there should be no remedy to redresse this wrong. And so it is of Coparceners, and this is one exception out of our Authors rule, 14 H. 4. 12. 38 E. 3. 5. 37 H. 6. 9. b. 10 El. Dyer 279. F. N. B. 35. Pl. Com. Seigneur Barkleys Case.

But if three Coparceners recover land and damages in an Assize of *Mordanc'* albeit the judgment be joynt, that they shall recover the land and the damages, yet the dama-

ges being accessory, though they be personall, doe in judgment of Law depend upon the Freehold, being the Principall, which is severall. And though the words of the judgment be joynt, yet shall it be taken for distributive: And therefore if two of them die, the entire damages doe not survive, but the third shall have Execution according to her portion, and this is another Exception, 14 E. 3. Execution 75. 45 E. 3. 3. b. But if all three had sued Execution by force of an Elegit, and two of them had dyed, the third should have had the whole by survivor, till the whole damages be paid.

Seet. 317, 318.

*En avowry pur vent tenants en common covient seuer, car ceo ē en le realty, come le Ass. ē supra.*

*Tenants en common poient bien faire partition enter eux s'ils voilont &c.*

Seet. 321.

*Les divers persons ont chateux reals ou personals en common, & pur divers Titles, si lun de eux mor<sup>s</sup> ses executors tiendrant & occuper. sco ouesque eux que survequent &c.*

Seet. 322, 323.

Albeit one Tenant in common take the whole profits, the other have no remedy in Law against him, for the taking of the whole profits is no Ejectment: but if he drive out of the land any of the Catel of the other Tenant in common, or not suffer him to enter and occupy the land, this is an Ejectment, &c. Whereupon he may have an *Eject. firma* for the one moiety, and recover damages for the entry, but not for the mean profits, fo. 199. b.

Note a diversity between actions which concern Right and Interest (as of *Eject. firma*, *Eject. de gard*, *quare ejecit infr. Term.* of a Chatel reall upon an expulsion or Ejectment) and actions concerning the bare taking of the profits



sits rising out of the land, or doing of Trespasse upon the land, as here by the Example ~~do~~ appear, for the right is several, and the taking of the profits in common, 21 E. 4. 11. 22. H. 6. 50. 58. 10 H. 7. 16. F. N. B. 117. 2.

The second diversity is between Chattels reals that are apportionable or severable, as leases for years, Wardship of Lands, Interest of Tenements by Elegit, Statute Merchant, Staple, &c. of Lands and Tenements; and Chattels reals entire, as Wardship of the body, and a Villain for years, &c. for if one Tenant in common take away the Ward or Villain, &c. the other hath no remedy by action, but he may take them again. *what he can see his time*

Another diversity is between chattels reals and chattels personals; for if one Tenant in common take all the chattels personals, the other hath no remedy by action, but he may take them again: And herein the like Law is concerning chattels reals entire, and chattels personals for this purpose. But of chattels entire, as of a Ship, Horse, or any other entire chattel real or personal, no survivor shall be between them that hold them in common, 10 H. 4. Trespasse 178. 11 H. 4. 3. 189.

And Tenants in common shall not joyn in an Eject firme &c. for that such actions concern the Right of Lands which are several, 21 E. 4. 11. 12. fo. 200. a.

If two Tenants in common be of a Dove-house, and the one destroy the old Doves, whereby the flight is wholly lost, the other Tenant in common shall have an action of Trespass, and he cannot plead in barre Tenancy in common, 47 E. 3. 23. b.

And so it is if one Tenant in common &c. destroy all the Deer in a Park, &c. 4 E. 2. Trespasse 233.

And so it is, if one Tenant in common carry away the meer stones, &c. 1 H. 5. 1. 2 H. 5. 3. And if two Tenants in common be of a folding, and the one of them disturb the other to erect Hurdles, &c. 13 E. 3. Trespasse 212. 18 H. 6. 5.

If two several owners of houses have a River in common,

mon, &c. if one of them corrupt the ( Water ) River, the other shall have an action upon his Case, 13 H. 7. 26.

If two Tenants in common or joyntenants be of an house or Mill, and it fall in decay, and the one is willing to repair the same, and the other will not, he that is willing shall have a Writ *de reparatione fac. pro bono publico*, F. N. B. 127.

All those Books which affirm that an action of Account lieth by one Tenant in common or joyntenant against another, must be intended, when the one maketh the other his Bayliff, for otherwise never his Bayliff to render an Account is a good plea : F. N. B. 118. 1. 10 H. 7. 16. 2 E. 4. 25. *Westm.* 2. cap. 23.

If there be two Tenants in common of a Wood, Turbary, Piscary, &c. and one of them doth waste against the will of his companion, his companion shall have an action of Waste. *vide lb. fo. 200. b. & Nota.*

Some do hold that an action of Waste doth not lie upon the Statute *W. c.* 23. against Tenant in common, &c. for destroying the whole flight of Doves, 47 E. 3. 22. 50 E. 3. 3.

Note, that one Tenant in common may infeoff his companion, but not releale, because the Freehold is several. Joyntenants may releale, but not infeoff, because the Freehold is joynt : but Coparceners may both infeoff and releale, because their seisin to some intents is joynt, and to some several.

*Sect.* 324.

*Quant un home voile merrer un seoffment fait a luy, ou un done en taile, ou lease pur vie d'ascun terres &c. la il dirra par force de quel seoffment &c. il fuit seisee, &c. Mes lou un voile plead un lease ou grant fait a luy de chattel real ou personal, la il dirra, per force de quel il fuit possesse, &c.*

When a man pleads a leale for life, &c. which passeth by livery, he is not to plead an entry, for he is in actuall seisin by the livery it self. Otherwise it is of a lease for years.

## CHAP. V.

## Of Estates sur Condition:

Sect. 325.

**C**onditio dicitur cum quod in casum incert<sup>o</sup> qui potest tendere ad esse aut non esse consertur.

Condic<sup>o</sup> est 2<sup>a</sup> } 1. *Facti*, i. e. upon a condition expressed by the party in legal terms of Law.  
 2. *Furis*, i. e. *Tacite* created by law, without any words used by the party.

Littleton subdivideth Condition in Deed, into Condition precedent (of which it is said, *Condic<sup>o</sup> adimpleri debet, priusquam sequatur effectus*) and Condition subsequent.

Again, of Condition in Deed, some be Affirmative and some Negative, and some in the Affirmative which imply a Negative. Some make the estate whereunto they are annexed, voidable by Entry or Claim, and some make the estate void *ipso facto* without entry, &c. Also of Condition in Deed, some be annexed to the rent reserved out of the land, and some to collateral acts, &c. (some be single, some in the conjunctive, some in the disjunctive, *Mirror* cap. 2. 8. 15. 17. fol. 101. b.

*Sur Condit<sup>o</sup> en fait ē, sicome un home per fait indent, in seoffa un auter in fee render certain rent, &c.* Here Littleton putteth one Example of six several kinds of Condition: 1. Of a \* Condition \* single, in Deed. 2. Of a Condition subsequent to the estate. 3. Of a Condition annexed to the rent. And 4. a Condition that defeaterh the estate. 5. A Condition that defeaterh not the estate before entry. And 6. a Condition in the Affirmative which implyeth a Negative (as behind or unpaid implyeth a Negative) viz. not paid.

Bendloes

*Bendloes en Trespass, 5 Mar. Et en cest case si le rent ne soit pay, &c. Demand must be made before the rent shall not enter.*

*For* The Land is the principall debtor, for the rent issueth out of the Land, and that is the place of demand, appointed by Law, and the demand must ever be made at the most notorious place; and the last time of demand of the rent is such a convenient time, before the Sun-setting of the last day of payment, as the mony may be numbred and received. 40 *Aff.* 11. 49. *Aff.* 5. 15. *Eliz. Dy.* 329. *lib.* 4. *Burroughes c. f.* 72. &c. *Pl. Com.* 70. and 172. *Hill and Granges c. Lib.* 5. f. 114. *Wadcs c.*

191. If a rent be granted payable at a certain day, and if it be behind and demanded that the grantee shall distrein for it, in this case the grantee need not demand it at the day, but if he demand it at any time after, he shall distrein for it. *Lib.* 7. f. 28. *Mannes t. Mith.* 40. 41. *El. Stanly, &c.* Regularly it is true, that he that entreth for a condition broken shall be seised in his first estate; or of that estate which he had at the time of the estate made, &c. 8 H. 7. 7. b. Y. Limitation in respect of impossibility. 4 H. 6. 2. *Lib.* 8. *Fo.* 43. &c. *Whittinghams t. s.* H. 7. 4.

2. Limitation in respect of necessity: *Fo.* 202. n. *Vide, &c.*

3. In some cases the Feoffor by his reentry shall be in his former estate, but not in respect of some collaterall qualities; as if a Copihold escheat, and the Lord make a Feoffment in Fee upon condition, and enter for the condition broken; for that the custome or prescription for the time is interrupted.

Lord and Tenant by Fealty and rent, the Lord is seised of his rent, and granteth his Seigniorie to another in Fee upon condition, the Tenant attorn. and payeth his rent to the grantee, the condition is broken, the Lord distreins for his rent and rescous is made, he shall be in his former estate, and yet the former seisin shall not enable to have an *Aff.* without a new seisin. 15. *Aff.* 12. Tenant in taile, It. Feoffment in Fee Sur. condition. 8 H. 7. 7.

If tenant for life ft. Feoffment, &c. and ent. pur condition broken, the state is reduced, but the forfeiture is not purged. 43. *Aff.* 47. 13. E. 4. 4. Sect.

Condition to enter Sect 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1055, 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1064, 1065, 1066, 1067, 1068, 1069, 1070, 1071, 1072, 1073, 1074, 1075, 1076, 1077, 1078, 1079, 1080, 1081, 1082, 1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096, 1097, 1098, 1099, 1100, 1101, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1116, 1117, 1118, 1119, 1120

When the Feoffor is satisfied either by perception of the profits, or by payment, or tender and refusal, or partly by the one, and partly by the other. Fo. 203. *if profits may render*

The Feoffor by his reentry gaineth no estate of freehold but an interest by the agreement of the parties to take the profits in nature of a distress.

If a man make a Lease for life with a reservation of a rent; and such a condition, if he enter for the condition broken and take the profits of the land *Quousq. &c.* he shall not have an action of debt for the rent arere, for that the freehold of the Lessee doth continue; and therefore the book (to the contrary 30. E. 3. f. 7.) is false Printed, and the true case was of a lease for years.

Note a diversity, viz. If a man make *Alens p<sup>ur</sup> ans.* reserve a rent with a condition, that if the rent be behind, that the lessor shall reenter and take the profits untill thereof he be satisfied, there the profits shall be counted as parcell of the satisfaction, and during the time that he so taketh the profits, he shall not have an action of debt for the rent. But if the condition be that he shall take the profits untill the Feoffor be satisfied, &c. without saying thereof, &c. There the profits shall be taken to be no part of the satisfaction, but to hasten the lessee to pay it. 27 H.8. 4. And as Littleton here saith, that untill he be satisfied, he shall take the profits in the meane time to his own use. 31 Aff. pl. 26. Vide *testatie de Morton* c. 6. and c. 7. without this word (inde.)

*Sett.* 329.

If a man by Indenture letteth Lands for years; provided always, and it is counted and agreed between the said parties, that the lessee should not alien; it was adjudged that this was a condition by force of the proviso, and a Covenant by force of the other words. *Vide* Sect. 220. *Dyer* 28 H. 8. fo. 13. 27 H. 8. fo. 14. 15. *Seignior Cromwells c. Lib. 2. fo. 71. Lib. 8. 89. Frances c.*

*Un Feoffment in Fee e fait rendition rent, &c. Sur condition, &c. en cest case lestate del Feoffee e defeasible, si le condition ne soit performe, &c. vide Sect. 325.*

## Sect. 330.

*Inesse potest donationis modus, conditio, sive causa. Scito quod (ut) modus est, (si) condi. (quia) causa. 4. Mar. Dyer 138. b.*

If a man grant an annuity pro una acra terre, this word pro sheweth the cause of the grant, and therefore amounts to a condition; for if the acre of land be evicted by an elder title, the annuity shall cease, for *cessante causa cessat effectus*, 24 E.3. 34. 9 E.4. 20. 14 E.4.4. 15 E.4.2.

But if A. pro consilio impenso make a Feoffment or a Lease for life, of an acra, or pro una acra terre, &c. Albeit he denieth counsell, or that the acre be evicted, yet A. shall not reenter, for in this case there ought to be legall words of condition or qualification, for the cause or consideration shall not avoid the state of the Feoffee, and the reason of this diversity, for that the state of the land is executed, and the annuity is executory, fol. 204. a. vide &c.

If a man make a Feoffment in Fee, ad faciend. or faciendo, or ea intentione, or ad effectum, or ad proposit. that the Feoffee shall doe, or not doe such an act, none of these words make the state in the land conditionall, Hill. 18 Eliz. in Com. Ban. Dyer 138. Pl. Com. 142. d. & st. lib. 2. c. 34. It was adjudged H. 40 Eliz. Rot. 161. Browne, &c. That a Lease for years was but a contract, which may begin by word, and by word may be dissolved, Pl. Com. 142. Sometime in case of lands, &c. (casa) shall make a condition; as if a woman give lands to a man and his heirs, causa matrimonii prolocuti, and if she marry the man, or the man refuse to marry her, she shall have the land again to her and to her heirs. But otherwise it is if a man give land to a woman, &c. For the man may and ought to ask advise of learned counsell, 34 Ass. 1. 5 H.4. 1.

*Quod non licebit*, to the lessee dare, vendere, &c. *Sub pena forisfacturae*, amounts to make the Lease for years defeasible, 3 E.6. Dyer 65, 66. 4 Mar. 138.

Sect.

**Sect. 331, 332.**

*Quæ dubitationis causa tollendæ inferuntur, communem legem non ledunt, & expressio eorum quæ &c.*

*Mortgage, i.e. mortuum vadium. Vivum vadium, is,*

As if a man borrow 100.l. of another, and maketh an estate of lands unto him, untill he hath received the said summe of the issues and the profits of the land, so as in this case, neither money nor land dyeth or is lost.

*Vivum autem dicitur vadium, quia nunquam moritur ex aliqua parte quod ex suis proventibus acquiratur.*

**Sect. 334.**

*Feoffment ẽ fait en mortgage, le fcoffor mor' devant le jour de payment des deiners &c. Si l'heir del feoffor tender le mony al mes le jour, &c. & le feoffee ceo refuse &c. donques poit le heire enter en le terre, pur ceo que il ad interest de droit en le Condition, &c.*

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*Et le feoffee en ceo case nad asc' remedy daver le mony per le Common lcy, Sect. 335.*

The Condition descends unto the heir, and therefore the Law that giveth him an interest in the Condition, giveth him an ability to perform it; and hereby the intent of the Condition is performed, and the Feoffee doth receive no damage, &c. fol. 205. b.

The Executor or Administrator of the Mortgagor, or in default of them, the Ordinary may also tender, Sect. 337.

209.

If the Condition annexed to lands, be possible at the making of the Condition, and become impossible by the act of God, yet the state of the Feoffee &c. shall not be avoided. Pl. Com. 456. *Wrothes Case.* 14 Hen. 7. 3. 15 Hen. 7. 1. 14 Ed. 4. 3.

225.

206.

But where a Condition of a Bond, Recognizance, &c. is possible at the making of the Condition, and becomes impossible by the act of God, or of the Law, or of the Obligee &c. there the Obligation &c. is saved, and the reason of the diversity, because the state of the land is executed, and settled

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in the Feoffee, and cannot be redeemed back again but by matter subsequent, *viz.* the performance of the Condition. But the Bond &c. is a thing in action, and executory, whereof no advantage can be taken; untill there be a default in the Obligor, 15 H. 7. 18. 9 Eliz. 262. Dyer lib. 5. 22. Laughters Case. 38 H. 6. 2. Brit. c. 36. fol. 89, 99, 114, 130.

But if the condition of a Bond &c. be impossible at the time of the making of the condition, the Obligation &c. is single. And so it is of a Feoffment in fee with a condition subsequent, that is impossible, the state of the Feoffee is absolute; but if the condition precedent be impossible, no state or interest shall grow thereupon, 14 Hen. 8. 28. 10 Hen. 7. 22. 5 Eliz. Dyer 222. Pl. Com. 22. 272. Fullers Case. fol. 2c6. b.

223. If A. be bound to B. that J. S. shall marry J. G. before such a day, and before the day B. marry with Jane, he shall never take advantage of the Bond, for that he himself is the mean; that the condition could not be performed, 4 H. 7. 4. 30 H. 8. Dyer 42.

The Law distinguisheth between a Condition against law for the doing of any act that is *malum in se*, and a Condition against law, that is either repugnant to the State, or against some Maxime or Rule in Law: As

1. If a man be bound upon Condition, That he shall kill J. S. ~~the estate is absolute, and the Condition void,~~ 4 H. 7. 4. But if a man make a Feoffment in fee upon Condition, that the Feoffee shall kill J. S. the estate is absolute, and the Condition void, Pl. Com. 133. Brownings Case.

2. If a man make a Feoffment &c. that he shall not alien (or that the Feoffee shall not take the profits, &c.) this Condition is repugnant and against Law, and the state of the Feoffee is absolute. But if the Feoffee be bound &c. that he or his heirs shall not alien, this is good, for he notwithstanding alien if he will forfeit his Bond, &c. 20 Ed. 4. 8. 21 Hen. 7. 11. 30. 27 Hen. 8.

Albeit a convenient time before Sun-set be the last time given to the Feoffor to tender, yet if he tender it to the person

Of Estates sur Condition. 209

person of the Mortgagee at any time of the <sup>day of</sup> payment, and he refuseth it, the Condition is saved for that time, vide

S. 334.

Guardian in Socage may render in the name of the heir, 207 because he hath an interest, &c. vide S. 334. Hill, 28 Eliz. in Banco Reg. inter Walkins. if y<sup>e</sup> heir of any man

If the Mortgagee accept of a strangers tender in the name of the Mortgagor, &c. this is good, &c. 217

Omnis ratibabitio retro trahitur, & mandato equiparatur, 36 Hen. 6. tit. Barre 166.

Sect. 335.

The Obligor renders the money at the day &c. and the Obligee refuseth the same, yet in an action of Debt upon the Obligation, if the Defendant plead the tender, &c. he must also plead that he is yet ready to pay the money and tender the same in Court. But if the Plaintiff will not then receive it, but take issue upon the tender, and the same be found against him, he hath lost the money for ever, 22 Hen. 6. 39. lib. 9. fol. 79. H. Peytes Case.

And the reason wherefore the money is not lost by the tender and refusall, is not only for that it is a duty and parcell of the Obligation, but also for that the Obligee hath remedy by Law for the same.

Liberata pecunia non liberat offerentem, 8 E. 2. tit. Assize, Ass. 389.

When the Condition is collaterall to the Obligation, a tender and refusall is a perpetuall barre, 7 Hen. 4. 18. 5 Mar. Dyer 150. 21 E. 4. 25. 31. Ass. 25. Pl. Com. fol. 6.

Obligor makes a lease and a release to the Obligee, and his heirs, this amounts in law to a feoffment; and albeit this be a collaterall Condition, yet it is well performed.

Cum dicitur à cudendo, of Coining, &c. In French, Coin signifieth a Corner. Some say that Coine dicitur à xoyds, i. e. Communis, quod sit omnibus rebus communis. Moneta dicitur à monendo, not onely because he that hath it, is to be warned providently to use it, but also because Nota illa de authore

Et valore admonet. lib. 5. fol. 114. Wades Case, lib. 9. fol. 78.

Pecunia dicitur à pecu. Omnes en. veterum divitia in animalibus consistebant. Arist. l. 5. c. 8.

Nummus unde tñ vōux quia lege fit non natura, 9 Hen. 5. Stat. 2. cap. 7.

Seff. 336, & 337.

289. Note, he that hath interest in the Condition on the one side, or in the land on the other, may tender, fol. 207. b. & vide Seff. 334.

Auxi en case de Mortgage, si nul jour de payment soit limit, & le feoffor mor. &c. donques le temps de le tender est pas.

Note divers diversities. \*

1. Between a Feoffment in fee with Condition for the payment of a summe of money, where no time is limited; and the Condition of a Bond, &c. 21 E. 4. 38. b.

2. Between a Condition of an Obligation, which concerns the doing of a transitory act without limitation of any time as payment of money, delivery of Charters, &c. for there the condition is to be performed presently, i.e. in convenient time; and when by the condition of the Obligation the act is locall, for there the Obligor hath time during his life to perform it, as to make a feoffment &c. if the Obligee doth not hasten the same by request.

3. In case where the Condition is locall, when the concurrence of the Obligor and the Obligee is requisite (as in the said case of the Feoffment) and when the Obligor may perform it in the absence of the Obligee, as to acknowledge satisfaction in the Court of Kings Bench, for there he must doe it in convenient time.

4. Where the Condition concerneth a transitory or locall act, and is to be performed to the Feoffee or Obligee, and where it is to be performed to a stranger: As if A. be bound to B. to pay 10. l. to C. A. tenders to C. and he refuseth, the Bond is forfeit. But if the act had been by the Condition to be made to the Obligee, or to any other for his benefit a tender, &c. shall have the benefit, because he himself is the cause

cause that the Condition could not be performed, 22 E. 4. 13. 10 H. 7. 14. b. 35 H. 8. Dyer 56. lib. 5. fo. 23. Lambes Case \* 8 E. 4. 14.

5. Between a Condition of an Obligation and a Condition upon a Feoffment, where the act that is local is to be done to a stranger, and where to the Obligee or Feoffor himselfe: for the stranger shall be infeoffed as soon as conveniently may be, otherwise it is of the Feoffor, &c. for the privity of the Condition, &c. Lib. 6. fo. 31. Boothies Case, 1. 2. fo. 79. b. Seignieur Cromwells Case. 21 E. 4. 41. 2 E. 4. 3, 4. 4 E. 4. 4. b. 26 H. 8. 9. b.

6. When the Obligor or Feoffor is to infeoff a stranger as hath been said, and when a stranger is to infeoff the Feoffee or Obligee: As if A. infeoff of black acre, upon Condition, that if C. infeoff B. of white acre, A. shall re-enter, C. hath time during his life, if B. doth not hasten it, &c. and so of an Obligation, fo. 108. b.

7. But in some cases albeit the Condition be collateral, and is to be performed to the Obligee, and no time limited, yet in respect of the nature of the thing, the Obligor shall not have time during his life to performe it. As if the Condition of an Obligation be, To grant an Annuity to the Obligee during his life, payable at Easter; this Annuity must be granted before Easter, &c. Dyer 14 Eliz. 311.

8. When the Obligor, Feoffor or Feoffee, or a stranger &c. is to do a sole act, as to go to Rome, &c. they have time during life, &c.

The Executor &c. may (when a ~~man~~ is limited) pay the money, vide S. 334. l. 5. fo. 96, 97. Goodates Case.

If I infeoff one in fee upon Condition to make a gift in tail to I. S. and he refuseth it, and a tender and refusal is made, there the Feoffor shall not re-enter, for it was intended, that the Feoffee should have an estate in the land. And so it is if the Condition be, That the Feoffee shall grant a rent charge to a stranger, 2 E. 4. Enter Congable 25.

But otherwise it is if the Condition be to infeoff I. S. and his

his heirs, and a tender and refusal is made, &c. 19 H. 6. 34.

When the Executors make a tender, and the Feoffee refuseth, albeit the heir (who hath a Title of Entry) be a third person, yet is he no stranger, but he and the Executors also are privies in Law. Concerning goods and chattels, either in possession or in action, the Executor doth more actually represent the person of the Testator; then the heir doth the person of the Ancestor. For if a man bindeth himself, his Executors are bound, though they be not named, but so it is not of the heir.

Scct. 338, 339.

*En tous cascs de Condition de payment de certain sum en gros touchant terres &c. si loial tender soit un foits refuse, celui que doit le tender money e de ceo assouth & discharge pur tous temps apres; i. e. for ever to make any other tender, but if it were a duty before, though the feoffor enter by force of the Condition, yet the debt or duty remaineth: / As if A. borrow 100l. of B. and after mortgage lands to B. and he refuse it, A. may enter &c. and the land is freed for ever of the Condition; but yet the debt may be recovered by action &c. But if A. without any loan, debt or duty preceding, infeoff B. of land upon Condition for the payment of 100l. to B. in nature of a gratuity or gift; in that case if tender be made, and he refuse, B. hath no remedy therefore, fol. 209. b. Vide Libr. &c.*

The Agreement precedent doth guide the payment subsequent, and the payment ought to be real, and not in shew or appearance, 18 E. 4. 18. 19 H. 6. 54. 20 E. 3. Account pag. 70. *mortgage money must be paid to the mortgagor or his heirs*

If the Condition upon Mortgage be to pay to the Mortgagor or his heirs the money, &c. and before the day of payment the Mortgagor dyeth, the Feoffee cannot pay the money to the Executors, &c. for, *In hoc casu designatio unius personæ est exclusio alterius, & expressum facit cessare tacitum*, Lib. 5. &c. Dyer 2 Eliz. 181. 44 E. 3. 1. b. fo.

If a man make a Feoffment in fee upon Condition, That  
if

if the Feoffor pay to the Feoffee his heirs or assigns 20 l. before such a Feast, and before the Feast the Feoffee maketh his Executors, and dyeth, the Feoffor ought to pay the money to the heir, and not to the Executors, for the Executors in this case are no Assignees in Law. And the Feoffee hath an estate in the land which he may assign over, and where there may be Assignees in Deed, the Law shall never seek out, or appoint any assigns in Law, 27 H. 8. 3. 4 Mar. 140. a. M. 23, 24. El. in Curia Wardorum inter Randall & Browne. 2 El. Dyer 181. Pl. Com. Chapmans Case. 186. 188. 17 Aff. Pl. 2.

Sect. 240.

*Comment ascun. ont dit que le feoffor ẽ tenu de tender &c. sur la terre tenu in Mortgage, par ceo que le condition ẽ dependant sur le terre, uncore ceo ne prove que le feoffans de le condition destẽ performe, cavient erre fait sur la terre &c. & lestate de la terre ẽ dependant sur la condition &c.*

The money is a sum in grosse and collateral to the Title of the land, and the Feoffor must tender the money to the person of the Feoffee, and it is not sufficient for him to tender it upon the land, 8 E. 4. 4. & 14. 11 H. 4. 62. 17 Aff. p. 2. 21 H. 7. Kelway 74. 16 Eliz. Dyer 327. l. 4. f. 73. Boroughs Case 21 E. 4. 6.

Otherwise it is of a rent that issueth out of the land, 8 E. 4. 2. *though it*

But a corporal service is issuing out of land, as Homage, &c. must be done to the person of the Lord, 21 Aff. 3. 7 E. 4. 4. 21 E. 4. 17. 19 Eliz. Dyer 354. lib. 8. fo. 92. Frances Case.

If A. be bound to B. with condition that C. shall infeof D. on such a day, C. must give notice to D. thereof, and request him to be on the land at the day to receive the Feoffment, and he is bound to seek D. and to give him notice, 2 E. 4. 3. & 4.

Sect. 341, 342.

*Est diversity quant al tender de le rent que ē issuant hors de la terre, & del tender d'auert sum en grossic que nem pas issuant. &c.*

If the Condition be broken for non-payment of the rent, yet if the Feoffor bringeth an Assize for rent due at that time, he shall never enter, &c. because he affirmeth the rent to have a continuance, and thereby waveth the Condition. And so it is if the rent had a clause of distresse, &c. and the Feoffor had distrained for the rent, for non-payment whereof the Condition was broken, he should never enter for the Condition broken, but he may receive that rent, and acquit the same, and yet enter, &c. But if he accept a rent due at a day after, he shall not enter, &c. because he thereby affirmeth the lease to have a continuance, 14 Ass. 11. 45 Ass. 5. 6 H. 7. 3. Pl. Com. 133. 22 H. 6. 57.

It will be a good and sure thing, to set down in Conveyances every thing in certainty and particularity; and not to trust onely to a President, without advice of learned and well experienced men. For as the rule is concerning the state of a mans body, *Nullum medicamentum est idem omnibus*; so in the state and assurance of a mans lands, *Nullum exemplum est idem omnibus*, fo. 212. a. *To set down place of payment*  
*is best for Obligor or Mortgagee*  
 Sect. 343, 344.

*Lou le lieu de payment est limit, le feoffee nem. oblig. de recevoir le payment en nul autre lieu &c. Mes encore si il receivst &c. ceo est assets bone &c.*

The place is but a circumstance, &c.

*Nota diversit.* 1. When the Condition is for payment of money, there if the Feoffee or Obligee accept an horse &c. in satisfaction, this is good; but if the Condition were for the delivery of a horse &c. albeit the Obligee, &c. accept money &c. for the horse &c. it is no performance of the Condition. The like Law is if the Condition be to acknowledge a Recognizance of 20 l. if the Obligee or Feoffee accept



accept twenty pound in satisfaction of the condition it is not sufficient in Law, &c. And so it is of all other collateral conditions 3 H. 7. 4. b. 11 H. 7. 20. 21. 19 E. 4. 1. b. 22 E. 4. 24. l. 9. f. 78. 12 H. 4. 23.

2. When the money is to be paid to a stranger there if the stranger accept an horse, or any collaterall thing in satisfaction of the money, it is no performance of the condition, because the condition is strictly to be performed in that case. But if the condition be, that a stranger shall pay to the obligee, &c. a summe of money, there the obligee (being party, &c.) may receive a horse, &c. in satisfaction. l. 5. f. 17. *Primels* case.) \* *Vide* 4. H. 7. 4. *Dyer* 35 H. 8. 56. 27 H. 8. 1. If the obligor or lessor pay a lesse summe either before the day, or at another place then is limited by the condition, and the obligee \* or Feoffee (\* lessee) receiveth it, this is a good satisfaction. *Vide lib. fo. 212 b.*

Se<sup>ct</sup>. 345. <sup>2<sup>d</sup> Cond.</sup>

*Un annuall rent reserve al estranger, e sum. engrosse. & niny Rent*

This reservacion is meerly void. l. 8. f. 70. 71. words in a condition shall be taken out of their proper sense, *ut res magis valeat quam pereat*. 6. E. 2. entr. Cong. 55. *recipere*. 8 Aff. 34. *Revertere*. <sup>4<sup>th</sup> though a stranger, have not been said for it.</sup>

But if A. be leased of certain Lands, and A. and B. joyn in a Feoffment in fee reserving a rent to them both, and their heirs, and the Feoffee grant that it shall be lawfull for them and their heires to distraine for the rent, this is a good grant of a rent to them both, because he is party to the Deed, and the clause of distress is a grant of the rent to A. and B. But if B. had been a stranger to the Deed, then B. had taken nothing, and upon this diversity are all the Books which *prima facie* seem to vary reconciled. 18 E. Aff. 381. 26 H. 8. 2. 31 Aff. p. 31.

*Arg. a divisione est fortissimum in lege.* Se<sup>ct</sup>. 381.

Se<sup>ct</sup>. 346. &c.

*Nota* 2. choses, 1. *nul rent (que properment e dit rent) poit estr.*

149. *est reserve sur asc<sup>r</sup> Feoffment, done, ou lease, lorsque tantsole-  
ment al Feoffor, donor, &c. ou a lour heires. 2. Null entre, ou  
reentry (que e tout un) peut estre reserve, ne done a asc<sup>r</sup> person,  
lorsque, &c. al Feoffor, &c. Littletons meaning is, that either  
the Feoffor, &c. may reserve the rent to himselfe onely, or to  
himselfe and his heires. Fo. 213. b.*

If a man make a Feoffment in Fee, reserve a rent to him or  
his heires, it is good to him for terme of his life, and void to  
his heires. *1. s. fo. 111. Mallories case.*

If two joynttenants without a Deed indenture make a lease  
for life reserving a rent to one of them, it shall enure to them  
both, in respect of the joynt reversion, and so it is of a surren-  
der, &c. *5 E. 4. 4. a. 27 H. 8. 16. S. 58.*

But if Tenant for life, and he in the reversion joyne in a  
Lease for life, or a gift in taile by Deed reserving a rent, this  
shall enure to the Tenant for life only, during his life, and af-  
ter to him in the reversion, for every one grants that which  
he may lawfully grant. *M. 36. and 37. Eliz. in Banco R.*

*Scit. 347.*

238. Nothing in action, entry, or reentry can be granted over,  
285. for avoiding of maintenance, suppression of right, and stir-  
ring up of suits. No stranger shall take advantage of a con-  
dition that requireth a reentry.

But of limitations it is otherwise. As if a man make a lease  
*Quousq. i. e.* untill I. S. come from Rome, the lessor grant the  
reversion over to a stranger, I. S. comes from Rome, the gran-  
tee shall enter, because the estate by the expresse limitation  
was determined. *Pl. Com. 27. F. N. B. 201. l. 10. fo. 36. Mary  
Portingtons case.*

2. Another diversity is, between a condition annexed to  
a freehold, and a condition annexed to a Lease for years;  
for a Lease for years may begin, or end without ceremony;  
but an estate of Freehold cannot, &c. And of a void thing an  
estranger may take benefit, but not of a voidable estate by  
entry. *10 Aff. pl. 24. Pl. Com. 36. 11 H. 7. 17.*

3. Di-

3. Diversity between a reservation of a rent, and a re-entry, for a rent cannot be reserved to the heir of the Feoffor, but the heir may take advantage of a condition which the Feoffor could never doe; as if I. infeoffe another of an acre of ground, upon condition, that if mine heir pay to the Feoffee, &c. twenty shillings, that he and his heirs shall re-enter, this condition is good, &c. for he is privy in blood, and shall enjoy the Land as heir to me. *Pl. 313. Scho. 15. E. 4. 14. a.*

And if a man have a Lease for years, and demise, or grant the same upon condition, &c. and dye, his executors or administrators shall enter for the condition broken, for they are privy in right, and represent the person of the dead. *Vide 21 H. 7. 18. a. fo. 214. b. &c.*

If *cestuy que use* had made a Lease for yeares, &c. upon condition, the Feoffees should not enter for the condition broken, for they are privy in estate, but not privy in blood. *27 H. 8. 1.*

4. Diversity is in case of a Lease for years, where the condition is that the Lease shall cease or be void, and where the condition is that the lessor shall reenter, for there the grantee as *Littleton* saith, shall never take benefit of the condition: And note that where the estate or Lease is *ipso facto* void, by the condition or limitation, no acceptance of the rent after *209* can make it to have a continuance: otherwise it is of an *e-914* estate or Lease voidable by entry. *Pl. 136. Brownings case.*

5. Diversity between condition in Deed, and condition in Law.

As if a man make a Lease for life, there is a condition in Law annexed unto it, that if the lessee doth make a greater estate, &c. that then the lessor may enter of this and the like condition in law, which doe give an entry to the Lessor, the lessor himselfe and his heires shall not only take benefit of it, but also his Assignee and the Lord by escheat, every one for the condition in law broken, in their own time.

6. Diversity is between the judgement of the common Law, and the Law at this day by force of the Statute of *32 H. 8. ca. 34* for by the Common Law no grantee, or Assignee

of

of a reversion could take advantage of a re-entry by force of a condition. But now by the said Statute, it is otherwise. By which act it is provided, that as well every person which shall have any grant of the King of any reversion, &c. of any Lands, &c. which pertained to Monasteries, &c. as also all other persons being Grantees or Assignees, &c. to or by any other person or persons, and their heires, executors, successors and Assignees, shall have like advantage against the Lessees, &c. by entry for non-payment of the rent, or for doing of waste, or other forfeiture, &c. as the said lessors, or grantors themselves ought or might have had. 26 H. 6. tit. *entre-conge*. 49.

Upon this act divers judgments, &c. have been given, which are necessary to be known.

1. That the said Statute is generall, that the grantee of the reversion of every common person, as well as of the King shall take advantage of condition. Pl. 175. 76. *Hill and Granges* case M. 10. and 11 *Elix*. 180. *Dyer*.

2. That the Statute doth extend to grants made by the successors of the King, albeit the King be only named in the Act.

3. That where the Statute speaketh of Lessees, that the same doth not extend to gifts in Taile 14. *El. Dyer* 309. *Winters* case.

4. That where the Statute speakes of Grantees and Assignees of the reversion, that an Assignee of part of the estate, of the reversion may take advantage of the condition. As if Lessees for life be, &c. and the reversion is granted for life, &c. So if Lessee for years be &c. and the reversion, &c. the grantee for years shall take benefit of the condition in respect of this word (*execution*) in the Act. Pl. 69. *Kidwellies* case 7 E. 3. 54. and *Vide Dyer* 309.

5. That a grantee of part of the reversion shall not take advantage, &c. As if the Lease be of three Acres, reserving a rens upon condition, and the reversion is granted of two acres, the rent shall be apportioned by the act of the parties, but the condition is destroyed, for that it is entire, and against

gainst common right, lib. 5. fol. 54. *Knights Case, Winters Case, &c.*

6. That in the Kings case, the condition, &c. is not destroyed, &c.

7. By act in Law a condition may be apportioned in the case of a common person, as if a Lease for years be made of two acres, one Burrough English, and the other at the common law, and the lessor having issue two sons dieth, each of them shall enter for the condition broken, and likewise a condition shall be apportioned by the act and wrong of the Lessee, as in the Chap. of Rents, l. 4. f. 120. *Dumpers Case.*

8. If a Lease for life be made, reserving a rent upon condition, &c. the Lessor levies a fine of the reversion, he is Grantee or Assignee of the reversion, but without attornment he shall not take advantage of the condition. P. 20. *El. in Com. Ba. Dukes Case lib. 5. 112. b. Mallories Case.*

9. Diversity between a condition that is compulsory, and a power of a revocation that is voluntary: for a man that hath a power of revocation, may by his own act extinguish his power, &c. in part, as by levying of a Fine of part, and yet the power shall remain for the residue, because it is in nature of a limitation, and not of a condition. P. 39. *El.* and 40, 41 H. *Earl of Salisburies case* in Court of Wards, 14 *El. Dy. 39.*

10. If the Lessor bargain and sell the reversion by Deed indenture and inroll. the Bargainee is not in the *Per* by the Bargainor, and yet he is an Assignee within the Statute.

So if the Lessor grant the reversion in Fee, to the use of A. and his heirs, A. is a sufficient Assignee, &c. because he comes in by the act and limitation of the party, albeit he is in the *Post*, and the words of the Statute be *To*, or *By*, and they be Assignee to him, although they be not by him: but such as come in meerly by act in Law, as the Lord of the villain, the Lord by Elcheat, &c. shall not take benefit of this Statute.

11. If the Lessor bargain and sell the reversion, &c. Or make a Feoffment in Fee, and the Lessee reenter, the grantee

tee, or Feoffee shall not take advantage, &c. Without making notice to the Lessee, *l. 8. f. 92. Frances Case.*

And 12. albeit the whole words of the Statute be for non-payment of the rent, or for doing of wast, &c. yet the Grantees and Assignee shall not take benefit of every forfeiture, &c. but onely of such conditions as either are incident to the reversion as rent, or for the benefit of the State, as for not doing of wast, for keeping the houses in repair, for making of fences, scouring of ditches, for preserving of woods, &c. and not for payment of any summe in grosse delivery of corn, wood, &c.

So as other forfeiture, shall be taken for other forfeitures, like to those examples which were there put, (*viz.*) of payment of rent, and not doing of wast, which are for the benefit of the reversion, *Dyer 309.*

Sect. 348, 349.

*Seign. & Tenant, & le tenant ft. lease pur vie vend. rent, &c. & apres il mor. sans heire, &c.* Note, that the Lord by Escheat shall distreine for the rent, and yet the rent was reserved to the lessor and his heires, but both Assignees in Deed, and Assignee in Law shall have the rent, because the rent being reserved of inheritance to him and his heirs, is incident to the reversion, &c. The Guardian, &c. shall in the right of the heir take benefit of a condition, by entry or reenter, by the common law, *21 H. 7. 18. 17. Ass. 20. 18. Ass. pl. 18. lib. 7. f. 7. Earl of Bedfords Case*, otherwise it is of Assignees.

*Si terre soit grant a un home pur 2. ans sur condition que sil payeroit al grantor deins les 2. ans 10. l. donques il averoit Fee, &c. Si livery de fein. soit fait en ceste case, donques le grantee avoit le franktenement & le Fee sur m. le condition.*

Note, First, A condition precedent. 2. A condition which createth an estate may be made by parol without deed. 3. Livery, &c. in this case must be made before the lessee enter; for after his entry livery made to him that is in possession is void. 4. If no livery be made, no Fee simple doth passe. 5. It is inconvenient that the Fee should passe without livery,

livery, &c. 6. *Argumentum ab inconvenienti*, is forcible in law. *vide Sect. 60. fol. 216. a.*

Sect. 350.

Si terre soit grant a un home pur terme de 5 ans, sur condition que sil paya al grantor deins les 2 primer ans 40 M. que adonque il avant fee, on antierment forsque pur les 5 ans, & livery est fait &c. per force del grant, ore il ad fee simple condition, &c. Many are of opinion against Littleton in this case, and their reason is, because the Fee simple is to commence upon a condition precedent, and therefore cannot passe untill the condition be performed. And that Littleton here of a condition precedent, doth (before performance) make it subsequent; and they avouch many Authorities, as 31 E. 1. *Foefments & Faits* 119. 12 E. 2. *Voucher* 265. 7 E. 3. 10. *Pl. Com.* 272. *Sayes Case.* 44 E. 3. *Attaint* 22. 43 *Aff.* p. 41. 10 E. 3. 39. 40. 10 *Aff.* 15 *Aff.* 161. *Pl. Com.* 135. *Brownings Case.* 6 R. 2. tit. *quid juris clamat*, 20. And generally the Books are cited that make a diversity between a condition precedent and a condition subsequent, 15 H. 7. 1. a. 14 H. 8. 18. 20. 3 H. 6. 6. b. And lastly, they cite *Dyer* 10 El. 281. and in *Say and Fullers Case.* *Pl.* 272. the opinions of *Dyer* and *Erwine*, *vide lib. fol. 217. a.*

Notwithstanding all this, there are those that defend the opinion of Littleton, both by Reason and Authority. By Reason, for that by the Rule of Law, a Livery of Seisin must passe a present Freehold, and cannot give a Freehold in futuro. 2. It cannot stand with Reason, that a Freehold should remain in the lessor, against his own Livery of Seisin, seeing there is a person able to take it. A Livery of Seisin cannot expect.

And they say further, That seeing all the Books aforesaid prove that such a Condition is good, and that the Livery made to the Lessee is effectual, by consequence the Freehold and Inheritance must passe presently, or not at all; and it is not rare, say they, in our Books, that words shall be transposed and marshalled, so as the Feoffment or Grant may take effect,



effect, *Pl. 171. Hill and Granges Case. 10 Eliz. 3. lib. 8. fol. 74. Seignior Staffords Case. Pl. 487. Nichols Case.*

And further they take a diversity in this case between a lease for life, and a lease for years. For in this case of a lease for life, with such a Condition to have fee, they agree that the Fee simple passeth not before the performance of the Condition, for that the Livery may presently work upon the Freehold: But otherwise it is in case of a lease for years.

Also they take a diversity between Inheritances that lie in grant, and that lie in livery, *fol. 217. b.*

They also make severall Answers to the Authority before cited: for, as to the case in *31 E. 1.* they say, That either the case is misreported, or else the law is against the judgment:

For the case is but this, That a man make a lease of a Manour to *B.* for 20 years, and after the 20 years *B.* shall hold the Manour to him and his heirs by 12 *l.* rent, and (as it must be intended) maketh Livery of Seisin; in this case it is clear (say they) that *B.* hath a Fee simple maintainant, for there is no Condition precedent, &c.

As for the case in *12 E. 2.* the case is, That *J. de M.* made a Charter to *J. de Burford* of Fee simple, and the same day it was covenanted between them, That *J. de B.* should hold the same Tenements for 8 years, and if he did not pay 100 Mark at the end of the term, that the land shall remain to *J. de B.* and his heirs. In which case say they, there is a repugrancy &c. for the Covenant being made after the Charter, could neither alter the absolute Charter, nor upon a Condition precedent give him a Fee simple that had a Fee before.

To all the other Books, *viz. 7 E. 3. &c.* they say, that being rightly understood, they are good law, for in some of those Books, as in *10 E. 3. 10 Aff. &c.* it appeareth, That there was a Charter made in surety of the Term, which say they must be intended thus, *viz.* A man maketh a lease for years, the lessee enters, and the lessor makes a Charter to the lessee

lessee, and thereby doth grant unto him, that if he pay unto the lessor 100 Mark during the term, That then he shall have fee, &c.

In this case, say they, there need no livery seisin, but doth endure as an Executory grant by encreasing of the state, and the fee simple passeth not before the condition performed; Pl. 487. *Nichols Case*. And therefore *Littleton* warily putteth his case made all at one time by one Conveyance, and a Livery made thereupon.

And this diversity (say they) is proved by Books, 10 E.3. 34. 32 E.3. Garr. 30. 43 E.3. 35. 20 Aff. Pl. 20.

And they adde, That *Littleton* had seen and considered of the said Books, and hath set down his Opinion, &c. Fol. 118. a.

*Benigne lector utere tuo iudicio, nihil enim impedit. Conditiō beneficiālis quæ statum construit benigne secundum verborū intentionem est interpretanda, odiosa autem quæ statum destruit strictè secundum verborum proprietatem est accipienda, Lib.8. fol.90. Frances Case.*

Note, a precedent Condition to increase an estate must 208. be performed, and if it become impossible, no estate shall rise.

Regularly when any man will take advantage of a Condition, if he may enter, he must enter, and when he cannot enter, he must make a claim, because a Freehold and Inheritance shall not cease without entry or claim; and also the Feoffor or Grantor may wave the condition, Pl. 133. b. *Browning*.

If a man bargain and sell land by Deed indented and inrolled, with a proviso, That if the Bargainor pay &c. that then the state shall cease and be void, he payeth the money, the state is not re-vested in the Bargainor before a re-entry. And so it is if a bargain and sale be made of a reversion, remainder, advowson, rent common, &c. l. 2. f. 50. Sir *Hugh Cholmleys Case*, fo. 218. vide & nota.

But the said Rule hath divers Exceptions:

1. In this present case of *Littleton*, for that he can make

effect, *Pl. 171. Hill and Granges Case. 10 Eliz. 3. lib. 8. fol. 74. Seignior Staffords Case. Pl. 487. Nichols Case.*

And further they take a diversity in this case between a lease for life, and a lease for years. For in this case of a lease for life, with such a Condition to have fee, they agree that the Fee simple passeth not before the performance of the Condition, for that the Livery may presently work upon the Freehold: But otherwise it is in case of a lease for years.

Also they take a diversity between Inheritances that lie in grant, and that lie in livery, *fol. 217. b.*

They also make severall Answers to the Authority before cited: for, as to the case in *31 E. 1.* they say, That either the case is misreported, or else the law is against the judgment:

For the case is but this, That a man make a lease of a Manour to *B.* for 20 years, and after the 20 years *B.* shall hold the Manour to him and his heirs by 12. l. rent, and (as it must be intended) maketh Livery of Seisin; in this case it is clear (say they) that *B.* hath a Fee simple maintainant, for there is no Condition precedent, &c.

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But the said Rule hath divers Exceptions:

1. In this present case of *Littleton*, for that he can make

no entry, he shall not be driven to make any claim to the reversion, for seeing by construction the Freehold and Inheritance passeth maintenant out of the lessor : by the like construction the Freehold and Inheritance by the default of the lessee shall be revested in the lessor without entry or claim, *l. i. f. 174. Digs Case, 20 E. 4. 19. 20 H. 7. 4. b.*

2. If I grant a rent charge in fee out of my land upon condition ; if the condition be broken, the rent shall be extinct, &c.

3. If a man make a feoffment unto me in fee upon condition that I shall pay unto him 20 l. at such a day &c. before the day I let unto him the land for years, reserving a rent, and after fail of payment, the feoffee shall retain the land, &c. and the rent is extinct, &c. for that the feoffor could not enter, &c. for he himself was in possession, and the condition being collateral, is not suspended by the lease : otherwise it is of rent reserved.

If a man make a lease for 40 years, and the lessor grant the reversion to the lessee upon condition, and after the condition is broken, the term was absolutely surrendered. And the diversity is when the lessor grants the reversion to the lessee upon condition, and when the lessee grants or surrenders his estate to the lessor, for a condition annexed to a surrender, may revest the particular estate, because the surrender is conditional. But when the lessor grants the reversion to the lessee upon condition, there the condition is annexed to the reversion, and the surrender absolute, *7 E. 4. 29. 14 E. 4. 6. 45 E. 3. 8 E. 2. Aff. 395.* A Guardian in Chivalry took a Feoffment of the Infant, &c. *50 E. 3. 27. Vide lib. fo. 218. b.*

*On le feffor poit loialment enter pur le condition enfreint &c. la il nad franktenement devant son entry &c. S. 351.*

*Seff. 352.*

It is necessary when a day is limited, to adde to the condition, that the Feoffee or his heirs do perform the condition ; but when no time is limited, then the Feoffee at his peril must perform the condition during his life (although there

there be no request made) or else the Feoffor or his heirs may re-enter. ~~And~~ When the Feoffee is to give the land to the Feoffor and his wife in Tail before Michaelmas, &c. and if the Feoffee dye before the day, the State of the heir of the Feoffee shall be absolute, 15 H. 7. 13. 33 H. 6. 26, 27. 9 Eliz. Dyer 262. Pl. 45 G. lib. 2. f. 79. Scignior *Cromwells Case*.

If a man make a Feoffment in fee upon condition that the Feoffee shall make a gift in Tail to the Feoffor, the remainder to a stranger in fee, there the Feoffee hath time during his life, because the Feoffor who is party and privy to the condition, is to make the first estate. But if the condition were to make a gift in Tail to a stranger, the remainder to the Feoffor in fee, there the Feoffee ought to do it in convenient time, for that the stranger is not privy to the condition, and he ought to have the profits presently.

A condition that is to create an estate, is to be performed, by construction of Law, as near the condition as may be, and according to the intent of the condition, albeit the letter &c. cannot be performed. But otherwise it is of a condition that destroyeth an estate, for that is to be taken strictly, unless it be in certain special Cases, &c. As if a man mortgage his land to W. upon condition, that if the Mortgagee and I. S. pay 20 s. at such a day to the Mortgagee, that then he shall re-enter, the Mortgagee or dyeth before the day I. S. pay the money to the Mortgagee, this is a good performance of the condition. But if a man make a lease to two for years, with a proviso, if the lessees dye during the term, the lessor shall re-enter, one lessee alien his part and dye, the lessor cannot re-enter, but the Assignee shall enjoy the term so long as the survivor liveth, because the lease by the proviso is not to cease till both be dead, 30 H. 8. Condition. Br. 190. 33 H. 8. Joyntnants. Br. 62.

Note a diversity, when the feoffee dyeth, for then the condition is broken; and when the feoffor dyeth, for then the estate is to be made as near the intent of the condition as may be, 2 H. 4. f. 219. b.

Note, That after the decease of the husband, the State is

not to be made to the wife, and the heirs of her body by her late husband ingendred, and so to have an estate of Inheritance, as she should have had by survivor, if the estate had been made according to the condition, but onely an estate for life without impeachment of Waste &c.

*Sans impeachment per action de waste*, extends but to the action, &c. *Lib. 11. fo. 83. l. 9. f. 9. l. 2. 23.*

*Sett. 353, 354.*

225 Note, That the feoffee hath time during his life to make the estate, unless he be reasonably required by them that are to take the estate. This is to be intended of parties or privies, and not of meer strangers, for there the state must be made in convenient time, *fo. 220. a.*

Si feoffment soit fait sur condition que le feoffee re-ensfeoffor plusieurs homes, a av. & tener a eux, & a leur heires &c. & tous ceux que devient av. estate mor' devant asc' estate fait a eux, doncque doit le feoffee faire estate al heire celui que survesquist de eux, a aver & tener a luy, & les heires celui que survesquist, *220. b.*

The reason wherefore the *Habendum* is thus limited &c. is, for that if it were made to the heirs of the heir, then some by possibility should be inheritable to the land, which should not have inherited if the estate had been made to the survivor and his heirs, and consequently the condition broken.

*Sett. 355, 356.*

Of Disabilities, some be by act of the party, and some by act in Law, and some by act in *presenti*, and some in *futuro*.

The feoffee is disabled when he cannot convey the land over according to the condition in the same plight, quality and freedom, as the land was conveyed to him, *13 H. 7. 23. b. 32 E. 2. Barre 264. 21 Ass. 28. 38 Ass. pl. 7.*

*Sett.*



## Sect. 357.

*Si le Feoffee sur condition d'enseoffer un autre, &c. fait lease pur ans a commencer al jour a vener*; this is a present disability and cause of entry, for that the land is not in that freedome, &c. as it was conveyed to the Feoffee; And after the State made over according to the condition the land shall be charged therewith. *l. 2. f. 59, 60. Julius winningtons case.*

Plight signifieth not onely the estate, but the habit and quality of the land, and extendeth to rent charges, and to a possibility of Dower. *Vide S. 289. fo. 221. b.*

If the feoffee were married at the time of the feoffment, then the dower can be no disability, because the land shall remain, &c. as it was at the time of the feoffment made unto him.

The Feoffee being disabled at any time, though the same continue not, yet the Feoffor may re-enter.

And note a diversity between a disability for a time on the part of the Feoffee; and on the part of the Feoffor. For if a man make a Feoffment in fee upon condition, that the Feoffee before such a day shall re-enseoffe the Feoffor, the Feoffee taketh wife, and the wife dieth before the day, yet may the Feoffor re-enter for that, maintenance by the disability of the Feoffee the condition is broken: But so it is not by the disability of the Feoffor, or his heirs, for if they perform the condition within the time it is sufficient. *21 E. 4. 55. Trin. 18 El. in C. Ban. Sir Th. wiats case.*

## Sect. 358.

If the Feoffee be disseised, and after binde himself in Statute Staple, &c. or take wife, this is no disability in him, for that during the disseisin, the land is not charged therewith, &c. *fo. 222. a.* Note, there are other disabilities implied. *18 Aff. pl. ultimo. 19 E. 3. 39. Lib. 2. fo. 80. b. Snr. Cromwells case.*

If a man grant an advowson upon condition that the grantee shall regrant the same to the grantor in tail. In this case if the Church become void before any regrant, or before any

any request made by the grantor, he may take advantage of the condition, because the Advowson is not in the same plight, &c. P. 14. *El. in Com. ban.*

If the Feoffee suffer a recovery by default upon a failed title, before execution sued the Feoffor may reenter for this disability. 44 E. 3. 9.

*Seft. 359, 360.*

If an agreement be made between two, that the one shall infeoffe the other upon condition in surety of the payment of certain money, and after the livery is made to him, and his heirs generally, the State is holden by some to be upon condition, in as much as the intent of the parties was not changed at any time, but continued at the time of the livery. 34 *Ass. pl. 1. 13 E. 3. F. stopp. 177.*

*Un Feoffment sur condition que le Feoffee ne alienam a nulluy, cest condition est void.* So it is of a devise, grant, release, confirmation, &c. whereby a fee simple doth passe. 33 *Ass. 11. Doff. & St. 39. 124. 13 H. 7. 23. 21 H. 6. 34. a. 8 H. 7. 10. b. Arg. ex absurdo. Vide S. 7 22. fo. 213. a. Vide, &c.*

*Iniquum est ingenuis hominibus non esse liberam rerum suarum alienationem; & rerum suarum quilibet est moderator, & Arbitr.* & Reg. Non valet pactum de re mea non alienanda. But these are to be understood of conditions annexed to the grant or sale it self, in respect of the repugnancy, and not to any other collateral thing.

Some have said that a man may grant a rent charge newly created out of Lands to a man and his heirs upon condition, that he shall not alien that, that is good, because the rent is of his owne creation, but it is against the reason of *Littleton*, &c.

Before the Statute of *Quia empt. ter.* the Lord might have restrained the alienation of his Tenant by condition, because the Lord had a possibility of Reverter; and so it is in the Kings case at this day, because he may reserve a tenure to himselfe. 14 H. 4. 13 H. 7. 23. 21 H. 7. 8. l. 5. 56. *Knights case.*

If A. be seiled of bl. acie in fee, and B. infeoffe him of wh. acie

acre upon condition, that A. shall not alien B. acre, the condition is good; for it is annexed to other land, and ouster not the Feoffee of his power to alien the land whereof the Feoffment was made, and so no repugnancy, &c. And so it is of gifts, or sales of Chateles reals, or personals.

Sett. 361.

If a Feoffment in fee be made upon condition, that the Feoffee shall not infeoffe F.S. or any of his heirs or issues, &c. this is good. *Pl. Com. 77. a. 8 H. 7. 10. b. 21 E. 4. 47. a.*

If the feoffee in this case infeoffe I. N. of intent that hee shall infeoffe I. S. this is a breach of the condition; for, *quando aliquid prohibetur fieri ex directo, prohibetur & per obliquum. Fo. 223. b. 10 H. 7. 11. D. & St. 124. 13 H. 7. 23.* In ancient Deeds, &c. there was commonly a clause, *Quod licitum sit donatoris rem datam dare vel vendere cui voluerit, except. vivis Religiosis et Judais, Brac. l. 1. fo. 13. 2.*

Sett. 362.

A double Neg. in legall construction, shall not hinder the Neg. 33 *Aff. 11. 21 H. 7. 11. Vide S. 220.*

If a man make a Lease for years, or for life upon condition that they shall not grant over their estate, or let the Land to others, this is good, and yet the grant or Lease should be lawfull. *21 H. 6. 33. 31 H. 8. Dy. 45. 27 H. 8. 17, 19. 41 in the Cause for.*

*Quilibet potest renunciare juri pro se introducto. Dy. 33 H. 8. fo. 48, 49. lib. 6. 40, 41. Sir Ant. Mildmayes case.*

Note, that to estate tail, &c. there be divers incidents. 1. To be dispunished of waste. 2. That the wife of the donee in tail shall be endowed. 3. The Husband, &c. shall be Tenant by the Curtesie. 4. That, Tenant in tail may suffer a common recovery: and therefore if a man make a gift in tail upon condition to restrain him of any of these incidents, the condition is repugnant and void in Law. *22 E. 3: 19. 17 El. 343. Dy.* And note, that a collaterall warranty or a lineall with Assets in respect of the recompence, is not restrained by the Statute of *Donis Cond.* no more is the Common

mon recovery in respect of the intended recompence. 13 H.7.  
24.b.

If a man make a feoffment to a Baron and feme in fee, upon condition that they shall not alien, to some intent this is good, and to some intent it is void : for to restrain an alienation by Feoffment, or alienation by Deed, it is good, because such an alienation is tortious and voidable : but to restrain their alienation by fine is repugnant and void, because it is lawfull and unavoidable : Whatsoever is prohibited by the intent of any Act of Parliament, may be prohibited by condition.

Sect. 363.

A man makes a gift in tail to A. the remainder to him, and to his heirs upon condition that he shall not alien : some are of opinion, that this is a good condition, and shall defeat the alienation for the estate tail onely, and leave the fee simple in the alienee ; for that, the condition in Law extends onely to the estate tail. 11 H.7.6. &c. fo. 224.a.

But a gift in tail may be made upon condition that tenant in tail, &c. may alien for the profit of his Issues.

Sect. 364. \* Nota.

Home poit doner terres en taile sur condition que si le tenant en le taile ou ses heires alienont en fee, ou en taile ou pur terme d'aur. vie, &c. & auxy que si tous issues veignants del Tenant in taile soient morts sans issue ; que donques bien liroit al donor & a ses heires d' enter, &c. & partiel voy le droit del taile poit erē solve apres discontē in al issue en le taile, si as y soit, issint que per voy dentre del donor, ou de ses heirs, le taile ne serra my defeat per tiel condition. *Littleton* to make the condition good, addeth an alienation which amounted to a wrong, and he restraineth not the alienation onely, but added, and die without issue, to the end that the right of the estate in tail might be preserved, and not defeated by the condition, but might be recovered again by the issue in tail in a *Formedon*. Si plures conditiones ascrip-  
præ

præ fuerunt donationi conjunctim omnibus ē parendum, & ad veritatem copulative requiritur quod utraque pars sit vera. *Brac. l. 2. fo. 19. Pl. 76. Wimbessh case, and 107. Fulmerstons case.* But, si *divisim, cuilibet, vel alteri eorum satis ē obtemperare & in disjunct. sufficit alteram partem esse veram.*

If a man make a Lease to the husband and wife for 21. yeares, if the husband and wife, or any child between them so long shall live, and then the wife die without issue, the Lease shall continue, for the disjunctive referreth to the whole. *Pl. 30 El. Com. ban. Baldwin and Cock, Trupennies case*; and so it is if any use be limited to certain persons, untill A. shall come from beyond Sea, and attain unto his full age, or die; if he doth beyond Sea come from, or attain to his full age, the use doth cease. *H. 35 El. Trans per sur. Mordant. ban. R.*

Seet. 365.

Il ē common erudit. que home per plee ne defeatera asc' estate de franktenement per force dasc' tiel condition. Sin que il morat le ~~proprie~~ de condition en escript, &c. Si non en speciall cases, &c. Mes de chattels reals, sicome de Lease pur ans, auterment est; & issint ē de dones & grants, de chattels personals, and contracts personals, &c.

Be the action reall, personall, or mixt, if a condition be to defeat a freehold, it is Reg. true, that a Deed must be shewed forth in Court. Because every Deed ought to approve it self, that it be sufficient in Law, and that the Court shall adjudge: and secondly be proved by others, and this concerns matters of Fact, as sealing and delivery, and belongs to the jurors. *9 E. 4. 25, 26. 14 H. 8. 22. b. 28 Aff. pl. 1. l. 10. fo. 92. Dr Layfields case. 11 H. 7. 22. b.*

Upon a gift in tail, or a Lease for life a rent may be reserved without deed, but a condition with re-entry cannot be reserved without deed in this case. *45 E. 3. 21. a.*

By the Statute of 3 and 4 E. 6. ca. 4. and 13 El. ca. 6. the exemplification or constat under the great Seal of the inrolment of any Letters Patents made since the 4 of Feb. 27 H. 8. or after to be made, shall be sufficient to be pleaded and shewed

shewed forth in Court as well against the King, as any other person by the Patentees themselves, &c. *Dyer* 1 *El.* 167. 12 *H.* 7. 12. *b.*

*A constat Insuperimus*, &c. ought to be had onely of the inrolment of Record, and no deed, &c. can be inrolled, unlessse it be duly and lawfully acknowledged. *Lib.* 8. *fo.* 8. The Princes case. 1. *5. fo.* 52, 53. *Pages* case.

If Gardian in Chivalry in right of the heir enter for a condition broken, he shall plead the state upon condition without shewing of any Deed, because his interest is created by the Law; and so it is of a Tenant by State Merch. &c. and of Tenant in Dower, &c. 20 *H.* 7. 5. 35 *H.* 6. *Manors des faits* 11. *b.*

But the Lord by escheat albeit his estate be created by law shall not plead condition to defeat a freehold without shewing of it, because the Deed doth belong unto him. A Tenant by the Curtesie shall not plead a condition made by his wife, &c. without shewing the Deed.

But lessees for years, and all others that claim by any conveyance from the party, or justifie as servant by commandment, &c. must shew the Deed, 14 *H.* 8. 8. *Pl.* 149.

*R.* brought an ejection firme against *E.* of the Manor of *D.* which he had for years of the demise of *C.* &c. *E.* maintained his entry, &c. and shewed no deed, and the plea was good, because the thing was executed, *Vide le case fo.* 226. *a.* 44 *E.* 3. 22. Nota the defendant being issue in tail was remitted to the estate tail.

If land be mortgaged upon condition, and the mortgagee letteth the lands for years, reserving a rent, the condition is performed, the mortgagor reenters, in an act of debt brought for the rent, the lessee shall plead the condition, and reentry without shewing forth the Deed. 45 *E.* 3. 68. *Finch.* 10 *H.* 4. 9. *b.*

If a woman give land to a man and his heirs by deed, or without generally, she may in pleading averre the same to bee *causa matrim. prolocuti*, albeit she hath nothing in writing to prove the same. 9 *E.* 4. 25, 26. 14 *H.* 8. 22. *b.* 11 *H.* 7. 22. *b.* *F.N.B.* 205. *b.*

## Sect. 366.

*Item Contr. que home ne poit en asc' att' plesadex un condition que concerne le franktenement, sans manuer escript de ceo; encore poit home estre aid sur tiel condition per verdict de 12. homes prise a large en Ass. de no. diff. &c. Vide S. &c.*

*Judicium, est quasi juris dictum. l. 8. fo. 155. l. 9. f. 13. l. 11. f. 10. Ex facto jus oritur. fo. 266. Vide &c.*

*Omnis conclusio boni & veri judicii sequitur ex bonis & veris promiss. & dictis Jurator. Trin. 33 E. 1. in Thesaur. uile per inutile non vitiatur. M. 28 El. & 29. Gomershall account in Ban. R. 32 E. 3. Cessavit 25. 5. 484, 485.*

*If the matter and substance of the issue be found, it is sufficient. S. 58. 35 Ass. 8. 1 H. 4. 6. b. 27 H. 8. 22. b. Pl. 515. l. 4. f. 53. Raulins case, and Pledels case. H. 31 El. Sutton, &c. Com ban.*

*Estopper which bind the interest of the Land, as the taking of a lease of a mans own land by deed indentured &c. being specially found by the Jury, the Court ought to judge according to the speciall matter; for albeit estopper Reg. must be pleaded and relied upon by an apt conclusion, and the Jury is sworn *ad verit. dicendam*, yet when they finde *veritatem facti*, they pursue well their oath, and the Court ought to judge according to law. / So may the Jury find a warranty being given in evidence, though it be not pleaded, because it bindeth the right, unlesse it bee in a writ of right, when the Mesc. is joyned upon the Meer right. 34 E. 3. Droit 29.*

*After the verdict recorded, the Jury cannot vary from it, Pl. Fremans case. 11 H. 4. 2. 20 Ass. 12. 5 H. 7. 22. <sup>may vary from a private verdict</sup>*

*An issue found by verdict shall always be intended true untill it be reversed by attainr, and thereupon, &c. no Superfedcas is grantable by Law.*

*If the Jury after evidence at Bar, &c. do at their own charges eat or drink either before or after they be agreed on their verdict, it is finable, but it shall not avoid the verdict. P. 24 H. 8. Just. Spilman Ban. R. 29 H. 8. 37. Dier P. 6 E. 6. Com. Ban. 11 H. 4. 16, 17. 24 E. 3. 75.*

The



145. The King cannot be Nonsuit, for he is ever present in Court in judgement of Law. 21 E.3.18.

231. The condition is executed by re-entry, and yet the Lessor after his re-entry, shall not plead the condition without shewing the deed, because he was party and privy to the condition, for the parties must shew forth the Deed, unlesse it be by the act and wrong of the party; but an estranger which is not privy to the condition, nor claimeth under the same, shall not after the condition is executed in pleading, be forced to shew forth the Deed. Pl. 92. 9 H.7.3. Lib.9.12,13. Downams case. 31 Aff.p.21. 10 H.4.9.

336. Note, that a speciall verdict or at large, may be given in any action, and upon any issue, be the issue generall or speciall. 8 E.4.29. 11 Elix. Dyer 283,284.

*Discretio ē discernere per legem quid sit justum. Si à jure discedas, vagus eris, & erunt omnia omnibus incerta. l.10.fo.4. case de Sewers.*

Sect.367.

233. A verdict is twofold. 1. A verdict at large, or a speciall verdict, because it findeth the speciall matter, &c. Or leaves it to the judgement of the Court. 2. A generall verdict, that is generally found according to the issue, as if the issue be not guilty, to finde the party guilty, or not guilty generally, &c. There is also a verdict given in open Court, and a privy verdict given out of Court before any of the Judges of the Court.

To finde the speciall matter is the safest way for the Jury where the case is doubtfull.

Sect. 369.

Lease pur vie rendt. rent & re-entry sur condition, &c. & ceo est sans fait; lessor enter pur non payment, &c. lessee enter sur le lessor et luy disseist; &c. en cē case le disseisee nāvera Aff. et enc' si le lessee soit pl'. et le lessor defendant, il bar. se lessee par verdict de Aff. &c. Mes en ceo case lou lessee est defendant sil ne voile plead le lease pur vie, &c. en bar. mes plede nultort nul diff. donques le lessor recovers per

per Affize, 4 El. Dyer 207. 8 El. Dyer 246. A lease for life, the reversion to the Plaintiff was a good barre in Affize, and also that a lease for years, the reversion to the Plaintiff might be pleaded in an Affize; and so of a Feoffment with Warranty.

And note a diversity, viz. of a lease for life, the Tenant shall plead it in barre. But in case of a lease for years, or of an estate of Tenant by Statute or Elegit, the Defendant shall not plead in barre, as to say, *Aff. non*, &c. but justify by force of the lease, &c. and conclude, *& issint sans tort*. And if the Tenant of the Freehold be not named, he shall plead *Nul tenant de franktenement nosme en le breve*; and in the case of the Feoffment with Warranty, he must relye upon the Warranty, 18 E.4.10. 12 Aff.38.

## Sect. 370.

*Si Indenture soit bipartite, ou tripartite &c. tous les parts del endent ne sont que un fait en ley, & chesc' part del endent est auxi de grand force & effect, sicome tous les parts ensemble, l.3. fol. 20. Stiles Case.* An Indenture may be without words, but not by words without indenting. A Deed poll, because it is cut even, polled, &c.

Note, That if the Feoffor, Donor or Lessor, seal the part of the Indenture belonging to the Feoffee, &c. the Indenture is good, albeit the feoffee never sealeth the Counterpart belonging to the feoffor, fo. 229. 2. 9 E.4. 18. Pl. 134.

## Sect. 371, 372.

*A communi observantia non est recedendum, & minimè mutanda sunt quæ cert' habuerunt interpretationem; Magister rerum usus, 17 El. Dyer 342. 12 H.4. 12. 30 Aff. 31.*

It is provided by the Statute of 38 E.3. cap.4. That all penal bonds in the third person be void; wherein some of our books seem to differ &c. But the Statute was principally intended of the Courts of Rome; in which Courts bonds were taken in the third person: So as such bonds made out of the Realm are void, but other bonds in the third person

271.

son are Resolved to be good, as well as Indentures in the third person, 40 E. 3. 1. 2 H. 4. 10. 8 E. 4. 5.

*Brevia via per exempla, longa per præcepta.* It is a safe thing to follow approved Presidents; for, *Nihil simul inventum est, & perfectum.*

Sett. 273. Fol. 230. b.

Si en l'indenture fait en le 3. person, on en le 1. person mention soit fait que le grantor avoit mise seulement son seale & nemy le grantee, donques est l'indent tant seulement le fait le grantor. Mes tou mention est fait que le grantee ad mise son seale &c. donques il est le fait d'ambideux &c.

The office is no way made party to make it, being made in the first person, but onely by the clause of putting his Seal thertunto. *Vide Lib. &c.*

Sett. 374.

If A. by Deed indented between him and B. let lands to B. for life, the remainder to C. in fee, reserving a rent; Tenant for life dyeth, he in remainder entreth into the lands, he shall be bound to pay the rent, because he agreeth to have the lands by force of the Indenture, 50 E. 22. 3 H. 6. 26. b. fo. 231. a.

An Indenture of lease is ingrossed between A. of the one part, and D. and R. of the other part, which purport a demise for years by A. to D. and R. A. sealeth and delivereth the Indenture to D. and D. seal the Counterpane to A. but R. did not seal and deliver it. And by the same Indenture it is mentioned, that D. and R. did grant to be bound to the Plaintiff in 20 l. in case that certain conditions comprised in the Indenture were not performed. And for this 20 l. A. brought an action against D. onely, and sued forth the Indenture.

The Defendant pleaded, That it is proved by the Indenture, that the demise by Indenture was made to D. and R. which R. is in full life, and not named in the Writ, Judgment of the Writ. The Plaintiff replied, That R. did never

ver seal and deliver the Indenture, and so his Writ was good against D. sole. And there the Counsel of the Plaintiff took a diversity between a rent reserved, which is parcel of the lease, and the land charged therewith, and a sum in gross, as here the 20 l. is ; for as to the rent, they agreed, That by the agreement of R. to the lease, he was bound to pay it, but for the 20 l. that is a sum in gross, and collateral to the lease, and not annex to the land, and groweth due onely by the Deed, and therefore R. said he was not chargeable therewith, for that he had not sealed and delivered the Deed. But in as much as he had agreed to the lease which was made by Indenture for the same sum in gross, and for that R. was not named in the Writ, it was adjudged that the Writ did abate, 38 E.3.8.2. vide 44 E.3.11,12.

*Qui sentit commodum, sentire debet & onus : & transet terra cum onere.*

Scit. 375.

*Le jeoffor poit pledere condition en fait Poll ; pur ceo que il est privy al fait &c.*

*Felix qui potuit rerum cognoscere causas.*

*Et ratio melior semper praevallet.* Fol. 231.b.

If the Deed remain in one Court, it may be pleaded in another Court without shewing forth : *Quia lex non cogit ad impossibilia.* 40 Aff. 34. l. 5. 75. b. *Wymarks.* 12 H. 4. 8. F. N. B. 243. 234

Scit. 376.

When divers do a Trespafs, the same is joynt or severall, 274.  
at the will of him to whom the wrong is done ; yet if he release to one of them, all are discharged, because his own Deed shall be taken most strong against himself ; but other wise it is in case of Appeal of Death, &c. As if two women be joyntly and severally bound in an Obligation, if the Obligee release to one of them, both are discharged ; and seeing the Trespasfers are parties and privies in wrong, the one shall not plead a Release to the other, without shewing 256.  
of 288

of it forth, albeit the Deed appertain to the other, 27 E.3.  
83. 13 E.4.2. 15 E.4.26. 21 E.4.72. 22 E.4.7. 13 H.8.10.  
34 H.8. *esrange al fait* 21.

## Sect. 377.

Semper quære de dubiis, quia per rationes pervenitur  
ad legitimam rationem, &c. Ratio, est radius divini lu-  
minis.

216. If a man hath an Obligation, though he cannot grant the  
thing in action, yet he may give or grant the Deed, *viz.* the  
Parchment and Wax to another, who may cancel, and use  
the same at his pleasure.

Omnia præsumuntur legitimè facta, donec probetur in con-  
trarium. Injuria non præsumitur, fo.232.b.

There be three kinds of unhappy men :

1. Qui scit, & non docet. Infelix cujus nulli sapientia  
prodest.

2. Qui docet, & non vivit. Infelix qui recta docet cum  
vivit inique.

3. Qui nescit, & non interrogat.

Infelix qui pauca sapit spernitq; doceri.

Inter cuncta leges, & percunctabere doctos.

## Sect. 378.

Estates que homes ont sur condition en ley, sont tiels e-  
states que ont un condition per la ley a eux annex, comment  
que ne sont specifié en escript : sicome home grant person  
fait a un autre le office del Parkership pur terme de son vie, le  
estate que il ad en le office sur condition en ley sc. que le  
Parker bien & loialment gardian le Park, &c. (issint est de  
offic' de Seneschalship &c.) autrement bien liroit al grantor &  
a ses heires de luy ouste &c. Quia in eo quo quis delinquit, in  
eo de jure est puniendus, 15 E.4.3. l. 5 E.4.26. 28 H.8.  
*Bendloes &c. Lib.6. fo.50.95.96.99. Mich. 33 E.1. Coram*  
*Rege in Thesaur' levellq; de Durhams Case.*

Forresta est tuta ferar' mansio non quarumlibet, sed silve-  
strium, non quibuslibet in locis, sed certis & ad hoc ideonis,  
unde

unde Foresta E. murata in O. quasi fereſta, hoc eſt, ferarum ſtatio. *Ockam. vide Braſſ. fo. 231. & 316.*

Non-uſer of it ſelf without ſome ſpecial damage, is no forfeiture of private Offices; but Non-uſer of publike Officers which concern the adminiſtration of Juſtice, or the Commonwealth, is of it ſelf a cauſe of forfeiture, *Pl. 379, 380. 2 H. 7. 11. 30 H. 6. 32 &c.*

There is a diverſity between Officers that have no other profit, but a collateral certain fee, for there the grantor may diſcharge him of his ſervice; as to be a Bailly, Receiver, Surveyor, Auditor, &c. the exerciſe whereof is but labour and charge to him, but he muſt have his Fee: for the main Rule of Law is, That no man can fruſtrate or derogate from his own grant to the prejudice of the grantee, *18 E. 4. 8. 31 H. 8. Grants Br. 134. 34 H. 8. ibid. 93. 11 El. Dyer 285.*

But in all caſes where the Officer relinquisheth his Office, and refuseth to attend, he loſeth his office, fee, profit, and all.

There is another diverſity, where the grantee, beſides his certain fee. hath profits and avails by reaſon of his Office, as the Office of Stewardſhip of Courts, there the grantor cannot diſcharge him of his ſervice or attendance, for that ſhould be to the prejudice of the grantee, *22 H. 6. 10. 3. 6 E. 6. Dyer 72.*

Conditions in Law be of two natures, *i.e.* by the Common Law, and by Statute; and thoſe by the Common Law are of two natures, *i.e.* the one is founded upon ſkill and confidence, as here the Office of Parkership; the other without ſkill or confidence; whereof ſome by the Common Law, and ſome by the Statute. By the Common Law, as to every eſtate of Tenant by the Curteſie, Tenant in Tail after poſſibility, &c. Tenant in Dower, Tenant for life, for years, Tenant by Statute Merchant, or Staple, by Elegit, Gardian, &c. there is a condition in Law ſecretly annexed to their eſtates, that if they alien in fee, &c. that he in the reversion or remainder may enter, &c. or if they claim a greater eſtate in Court of Record, &c. *Pl. Com. 373. 3. Sir H. Nevils caſe. 21 E. 4. 20. 93. 18. f. 44. Wittinghams caſe, concerning condition in law found-*

ded upon Statutes, for some of them an entry is given; and for some other a recovery by action: where an entry is given as upon an Alienation in Mortmain, &c. and the like where an action is given, as for Waste against Tenant for life and years, &c.

As for Example, admit that an office of Parkership be granted or descend to an Infant or feme Covert; if the conditions in law annexed to this office which require skill and confidence be not observed and fulfilled, the office is lost for ever, because it is as strong as an express condition. But if a lease for life be made to a feme covert, or an Infant, and they by Charter of Feoffment alien in fee, the breach of this condition in Law, that is, without skill, &c. is no absolute forfeiture of their estate. So of a condition in Law given by Statute, which giveth an entry onely. As if an Infant or feme Covert with husband, aliens by Charter of Feoffment in Mortmain, this is no barre to the Infant or feme Covert. But if a recovery be had against an Infant or feme Covert in an action of Waste, there they are bound and barred for ever.

And note, that a condition in Law by force of a Statute, which giveth a recovery, is in some case stronger then a condition in Law without a recovery: for if lessee for life make a lease for years, and after enter into the land and make Waste, and the lessor recover in an action of Waste, he shall avoid the lease made before the waste done, (because of necessity the action of Waste must be brought against the lessee for life, which in that case must binde the lessee for years, or else by the act of the lessee for life, the lessor should be barred to recover *locum vastatum*, which the Statute giveth.) But if the lessee for life make a lease for years, and after enter upon him, and make a Feoffment in fee, this forfeiture shall not avoid the lease for years.

*Reg.* A man that taketh advantage of a condition in Law, shall take the land with such charge as he findes it.

And a condition in Law, is as strong as a condition in Deed as to avoid the estate, or interest it self, but not precedent charges to avoid, but in some particular cases. *Utique fortior*



*potentior est dispositio legis quam hominis.* Vide S. 419, 429, 430: fo. 234. a.

For Offices in any wise touching the Administration or execution of Justice, or Clerkship in any Court of Record, or concerning the Kings Treasure, Revenue, Account, Customs, Alnage, Auditorship, Kings Surveyor, or keeping of any of his Majesties Castles, Forts, &c. Conditions in Law are annexed, &c. 3 H. 7. c. 12. 7 E. 6. c. 1. 5 E. 6. c. 16.

And note, that all Promises, Bonds and Assurances (for such Offices &c.) as well on the part of the bargainor, as of the bargainee, are void, &c. *Nulla alia re magis Rom. Respub. interit, quam quod Magistratus officia venalia erant.* M. 13 Ja. R. lib. 3. f. 83. *Colsbils case.* Aerod. fo. 343.

*Jugurtha* going from Rome, said to the City, *Vale venalis Civitas, mox peritura si emptorem invenias.* Salust. 12 R. 2. cap. 2.

Sect. 379.

The Oath of a Beadle (or under-Bayliff) of a Manor, is, That he shall duly and truly execute all such Attachments and other Proces as shall be directed to him from the Lord or Steward of his Court, and that he shall present all Poundbreaches, which shall happen within his Office, and all Chattels waved, and Estrayes.

Sect. 380.

*Si lease soit fait al Bar. & si me, a aver & tenant a eux durant le couverture enter eux, en cē case ils ont estate pur terme de lour vies, sur condition en ley, sc. si un de eux devie, ou que dezorce soit fait enter eux, donques bien liroit a lessor & a ses heirs dentr.* &c.

54.

*Durante, dummodo, dum, quamdiu, donec, quousque, usque, ad, Tam, Din, ubicunque,* are words of limitation, 37 H. 6. 27. 10 Aff. 4. 11 Aff. p. 8. 7 E. 4. 16. 9 E. 4. 25, 26. 14 H. 8. 13.

*Divorces, à vinculo Matrimonii* are these, *causa præcontracti, causa metus, impotentie seu frigiditatis, Affinitatis, consanguinitatis, &c.* Divorce, *à mensa & Thoro*, dissolveth not the

25.

marriage à *vinculo Matrimonii*, for it is subsequent to the marriage, as *causa Adulterii*, 18 E.4.28. 24 H.8.8. *Bastards*. 11 H.4.14.76. *Vide* S.399. 32 H.8. c.38.

A man married the daughter of the sister of his first wife, and it was declared by Act of Parliament to be good. *Tr. 2. Ja. Rot.* 1032. *Ri. Parsons case*, fo.235.b.

*Sett.* 381.

Logick teacheth a man not onely by just argument to conclude the matter in question, but to discern between truth and falshood, and to use a good method in his study, and probably to speak to any legal question.

*Arg. à divisione.* Pl. Com. 561. b. *Vide* S.345.

*Sett.* 383.

185. Note a diversity, *viz.* when a man deviseth that his executor shall sell the land, there the lands descend in the mean time to the heir, and until the sale be made, the heir may enter to take the profits. But when the land is devised to his Executors to be sold, there the devise taketh away the discent, and vesteth the state of the Land in the Executor, and he may enter and take the profits, and make sale according to the devise, and the mean profits taken before the sale, shall not be Affets, so as he may be compellable to pay debts with the same, and therefore he must sell the lands as soon as he can, for otherwise he shall take advantage of his own Laches.

A man seised of certain lands holden in Socage, had issue two daughters A. and B. and devised all his lands to A. and her heirs, to pay unto B. a certain summe of money at a certaine day and place, the money was not paid, and it was adjudged that those words, To pay &c. did amount in a Will to a Condition, because the land was devised to A. for that purpose; otherwise B. should be remediless. *Et interest Republicæ suprema hominum testamenta rata haberi*: and the lessee of B. upon an actual ejectment recovered the moiety of the land against A, *M.31.* and 32 *El. Ban. R. Crickmers case*, Dy-

or 6 E.6. fo.74. 7 E.6.70. *Judicium pro veritate accipitur*, Fo. 236.b.

Señ. 384.

*Defaire*, i.e. to defeat or undo, *infectum reddere quod factum est*. There is a diversity between inheritances executed, and inheritances **executory**, as lands executed by livery &c. cannot by Indenture of defeasance be defeated afterwards; and so if a disseisee release a disseisor, it cannot be defeated afterwards, &c. but at the time of the release &c. the same may be defeated &c. for, *Qua incontinenti sunt inesse videntur*, Bract. l.2. f.16. 17 Aff.p.2. 30 Aff.p.1.11. But rents, annuities, conditions, warranty, &c. that be **inheritances executory**, may be defeated by defeasances made either at that time, or at any time after, and so the Law is of Statute, Recognizance, Obligation, and other things executory, 20 Aff.p.7. 7 E.4.29. *Brown and Bestons case*, Pl. 131. 28 H.8. Dy. 6. 27 H.8.15.

If a man seised of lands in fee, and having issue divers sons, by Deed indented covenanteth in consideration of fatherly love &c. to stand seised of three acres of land, to the use of himself for life, and after to the use of *Thomas* his eldest Son in Tail; and for default of such issue to the use of his second Son in Tail, with divers like remainders over; with a Proviso, that it shall be lawful for the Covenantor at any time during his life, to revoke any of the said uses &c. This Proviso being coupled with an Use, is allowed to be good: but in case of a Feoffment, or any other Conveyance, whereby the feoffee or grantee &c. is in by the Common Law, such a Proviso were merely repugnant and void, 27 H.8. cap.10. And first in the case aforesaid if the Covenantor who had an estate for life, do revoke the uses according to his power, he is seised again in fee simple without entry or claim. / 2. He may revoke part at one time, and part at another. / 3. If he make a Feoffment in fee, or levy a Fine &c. of any part, this doth extinguish his power but for that part, whereas in that case the whole condition is extinct; but if it be made of the whole, all the power is extinguished. So as to some purposes,

It is of the nature of a condition, and to other purposes in nature of a limitation. Lib. 1. fo. 173, 174. Digges case. 1. v. f. 107. Albainers case. 1. 10. f. 143. Scroops case. Lib. 7. fo. 12, 13. Sir Francis Englefields case. 4. If he that hath such a power of revocation hath no present interest in the land, nor by the Leasor of the estate shall have nothing, then his Feoffment or Fine, &c. of the Land is no extinguishment of his power, because it is meer collaterall to the Land. 5. By the same conveyances, that the old uses be revoked, may new be created and limited where the former cease *ipso facto* by the revocation, without either entry or claim. 6. That these revocations are favourably interpreted, because many mens inheritances depend upon the same.

*Ex paucis dictis intendere plurima possis.*

## C A P. VI.

### *Discent que tollent entries.*

Scit. 385.

13. **D**escendere, i.e. ex loco superiore in inferiorem movere. Brit. fo. 115. 215. Vide S. 5.

The Civilians call him, *haredem qui ex testamento succedit in universum jus testatoris*. But by the Common Law he is onely heir which succeedeth by right of blood. *Heres dicitur ab herendo, quia, qui heres ē, heret, hoc est, proximus est sanguini illi cujus est heres*. So as he that is *haries*, *sanguinis est heres & heus hereditatis*. Nota, in ancient time, if the disseisor had been in long possession, the disseisee could not have entred upon him, Brit. Fo. 115. Likewise the disseisee could not have entred upon the Feoffee of the disseisor if he had continued a year and a day in quiet possession. But the law is changed in both these cases, onely the dying seised being an act in Law, doth hold at this day. 1 Aff. 13. 9 Aff. 15. Lamb. explic. fo 120.

70. Porro autem quam maritus sine lite & controversia sedem incoluerit, eam conjux & proles sine controversia possidento, si qua in illum lis fuerit illata viventem, eam heredes ad se (perinde atque is vivus) accipiunt.

And one of the reasons of this ancient Law may be, that the heir cannot suddenly by intendment of Law, know the true state of his title. *Vide lib. fo. 237. b.*

To a discent that taketh away an entry, a dying seised is necessary, but a man to other purposes may have lands by discent, though his Ancestour died not seised. 11 H. 7. 12. 40 E. 3. 24.

Discents of inheritance incorporeall which lies in grant, as Advowsons, Rents, Commons in grosse, &c. doe not put him that right hath to an action; otherwise it is of houses and lands. 6 H. 4. 4. 15 E. 4. 14. F. N. B. 143. 9. 7. H. 4. 12. 5. 2. *Aff. p. 9.*

A recovery is had against Tenant for life, where the remainder is over in fee, Tenant for life dieth, he in remainder enters before execution and dieth seised, the entry of the recoveror is lawfull, because he is privy in estate, otherwise it is if the discent had been after execution. 3 E. 4. 6. 12 E. 4. 19. 3 H. 7. 3. 6 E. 4. 11. 7 H. 7. 15. 5 H. 7. 31. 10 H. 7. 5. b. 5 H. 7. 2.

A. recovereth an Advowson against B. in a Writ of Right, and hath judgement finall, the incumbent dieth, B. by usurpation presents to the Church, and his clark is admitted and instituted, B. dieth, A. is out of possession, and the heir of B. is not so bound by the judgement either in bloud or estate, but that he shall present, 45 E. 3. *qu. imp.* 139. B. levies a fine to A. of an advowson to him and his heirs, after the Church becomes void. B. presents by usurpation, and his Clark is admitted and instituted this shall put A. the Conusee out of possession. 8 E. 2. *Qu. imp.* 166. Albeit the usurpation were in both the said cases before execution, yet it put the rightfull Patron out of possession. So note a diversity between a recovery of Land, and of an Advowson.

Now by the Statute made since *Littleton* wrote, it is enacted that except the disseisor hath been in the peaceable pos-

session of such Manors, Lands, &c. whereof he shall dye seised by the space of five years next after such disseisin, &c. without entry or continual claim, &c. that there such dying Teilled, &c. shall not take away the entry &c. 17 H.6.1. *Leſtat.* 32 H. 8.c.33. *Seſt.* 422, 426. *Pl.* 47. *Wimbishes* case. *Fo.* 231.a. *vid. &c.*

*Ad ea que frequentius accidunt, jura adaptantur.*

The Feoffee of a disseisor is out of the said Statute, and remains as at the Common Law, *M.* 4. & 5 *El.* *Dyer* 219.

But if a man make a lease for life, and the lessee for life is disseised, and the disseisor dye seised, within 5 years the lessee for life may enter; but if he dye before he doth enter, it is said that the entry of him in the reversion is not lawfull, because his entry was not lawful at the time of the discent.

*Seſt.* 386.

If a disseisor make a gift in Tail, and the donee discontinueth in fee, and disseise the discontinuee, and dyeth seised, this discent shall not take away the entry of the disseisee, for the discent of the fee simple is vanished and gone by the Remitter, and albeit the issue be in by force of the estate Tail, yet the donee dyed not seised of that estate, *Fol.* 238.b.

If a disseisor make a gift in Tail, and the donee hath issue, and dyeth seised, now is the entry of the disseisee taken away; but if the issue dye without issue, the entry of the disseisee is revived, and he may enter upon him in the reversion and remainder, 9 H.7.24.

So if there be Grandfather, Father and Son, and the Son disseise one, and infeof the Grandfather, who dyeth seised, &c. the entry is taken away; but if the Father dyeth seised, and the land descend to the Son, now is the entry of the disseisee revived, and he may enter upon the Son, who shall take no advantage of the discent, because he did wrong unto the disseisee; 13 H.4.8,9. 33 H.6.5. b. *per Moyl.* 34 H.6. 11. a. *per Cur.* S. 393, 395. 13 E.3. *Br. Ent. cong.* 127. *vide & qn.*

If a disseisor make a lease to an Infant for life, and he is disseised, and a discent cast, the Infant enters, the entry

try of the disseisee is lawfull upon him.

Of Writs of Entry *sur* disseisin there be four kindes :

The 1. is a Writ of Entry in the nature of an *Affize*, 19 H. 6. 56. 9 H. 5. 9.

2. A Writ of Entry *sur* disseisin *in le per*, Brit. fo. 264, &c. E. 3. 216.

3. A Writ &c. *en le per & cui*, as where A. being the feoffee of D. the disseisor maketh a feoffment over to B. there the disseisee shall have a Writ of Entry *sur* disseisin of lands &c. in which B. had no entry but by A. to whom D. demised the same, who unjustly and without Judgement disseised the Demandant; These are called *gradus*, *degrees*, 265. which are to be observed, or else the Writ is abateable; for *sicut natura non facit saltum, ita nec lex*, 22 E. 3. 1. b. F.N.B. 192.

4. A Writ of Entry *sur* disseisin *en le post*, which lieth when after a disseisin the land is removed from hand to hand above the degrees, 14 H. 4. 40. *vide &c.*

No estate gained by wrong doth make a degree, and therefore neither abatement, intrusion, or disseisin upon disseisin, doth make a degree. Neither doth every change by lawful Title work a degree; as if a Bishop or an Abbot &c. disseise one and dye, where his successor is in by lawful Title, for though the person be altered, yet the Right remains where it was, *viz.* in the Church, and both of them seised in the same Right, &c. *An faciunt gradum de Abbate in Abbatem sicut de heredem in heredem? Et videtur quod non magis quam in computatione descensus, quia etsi alternetur persona, non propter hoc alternatur dignitas sed semper manet*, Br. l. 4. f. 321.

If a disseisor by Deed inrolled convey the land to the King, and the King by his Charter granteth it over, the disseisee cannot have a Writ of *enter en le per & cui*, but in *le post*, for the Kings Charter is so high a matter of Record, as it maketh no degree, 22 E. 3. 7. F.N.B. 191. k.

Also an estate of a Tenant by the Curtesie, or of the Lord by Eschear, or of an execution of an Use, by the Statute of 27 H. 8. or by Judgement or Recovery, or of any others



others that come in, in the post, work no degree, 5 E.2. Entry 66. 7 E.3. 360.

But a Tenancy in Dower by assignment of the heir, doth work a degree, because she is in by her husband; but assignment of Dower by a disseisor worketh no degree, but is in the post, 36 H.6. Dower 30.

When the degrees are past, so as a Writ of Entry in *le post* doth lie, yet by event it may be brought within the degrees again; as if the disseisor infeoffe A. who infeoffs B. who infeoffs C. or if the disseisor die seised, and the land descend to A. and from him to C. now are the degrees past; and yet if C. infeoffe A. or B. now it is brought within the degrees again. 44 E.3. 4. 5. 5 H.7. 6.

If the disseisor make \* a lease for life, the remainder in \* fee, Tenant for life dieth, he in the remainder is in the *per*, because he now claimeth immediately from the disseisor, and both these estates make but one degree, 50 E.3. 27.

Note, there be divers other Writs of Entry, besides this of entry *sur* disseisin, as a Writ of Entry *ad Terme qui prater* in *casu proviso*, in *confirm* *casu*, *ad com. legem*, *sine assensu capituli*, *dum fuit infra aet* *dum non fuit compos mentis*, *cui in vita*, *sur cui in vita*, *Intrusion*, *cessavit*, &c. and that which hath been said of one may be applied to all.

### Seet. 387.

53. 449. If a disseisor make a lease to a man and his heirs, during the life of I. S. and the lessee dieth living I. S. this shall not take away the entry of the disseisee, because he that died seised, had but a Freehold onely, and heirs were added to prevent an Occupant, for the heir in that case shall not have his age. Pl. 16 El. Com. Banco. Lambs Case. Dyer 8 El. 253. 7 H. 4. 46. 8 H. 4. 15. 11 H. 4. 42. 17 E. 3. 48.

But if the Kings Tenant for life be disseised, and the disseisor die seised, this descent shall not take away the entry of the lessee for life, because the disseisor had but a bare estate of Freehold during the life of the lessee. \*

If the heir of the disseisor die before he enter, the entry of the disseisee is taken away; and yet in pleading, the second heir shall make himself heir to the disseisor, &c. 24 E.3.47. An infant is disseised, and after cometh to full age.

*Sect. 388, &c.*

*En discents que tollent entry, il convient que celui que mor' seisee ad fee & franktenement al temps de son morant, on see tail & franktenement al temps, &c. fo. 239. b.*

Note, the law doth ever give great respect to the estate of Freehold, though it be but for term of life.

A descent in the collaterall line doth take away an entry, as well as in the lineall.

*Sect. 390.*

A dying seised, and a descent, and not a dying seised, and an Escheat, doth take away the entry: for the descent is the worthier Title. But if the disseisor die seised, and the heir of the disseisor die without heir, the disseisee cannot enter upon the Lord by Escheat. So as there is a diversity as touching the descent, when after a descent cast, the issue in tail dieth without issue, and when after a descent cast, the heir in fee simple dieth without heir, for he in the reversion, or remainder upon a state Tail, claimeth in above the state Tail; but the Lord by Escheat claimeth in under the heir in fee simple, 37 H.6.1.9 H.7.24.b.

*Sect. 391, 392.*

Note, a diversity between a Right, for which the Law<sup>270</sup> giveth a remedy by action, and a Title, for which the Law giveth no remedy by action, but by entry onely. For example; The feoffor upon (\* this case in) Condition, hath a Right to the land, \* and therefore his entry may be taken away, because he may recover his right by action; but the Feoffor or Donor that hath but a condition, his Title of Entry cannot be taken away by any descent, because he hath no

no remedy by action to recover the land. And therefore if a discent should take away his entry, it should barre him forever, 33 *Aff.* 11. 24. 21. *H.* 6. 17.

Also he that hath a Title to enter upon a Mortmain, shall not be barred by a discent, *Br. Mortmain* 6. 47 *E.* 3. 11.

And so it is, where a woman hath a Title to enter, *Causa matr. praelocuti*, 40 *Aff.* 13.

And so it is where the Freehold in Law is cast upon the Devisee, and the heir before any entry made by the Devisee, enter, and dyeth seised.

And so it is of him that entreth for consent to a Ravishment, *P.* 32 *El. Com. Ban. Martin Trette of London*, 41 *E.* 3. 14. *per Finchden. P.* 1 *Ja. Com. Ban.*

To this may be added, as a like case, the Kings Patentee, before he enter, &c.

Another reason, wherefore a discent shall not take away the entry of him that hath a Title to enter by force of a Condition &c, is, for that the Condition remains in the same essence that it was in at the time of the creation of it, and cannot be devested, or put out of possession, as Lands and Tenements may.

*Sett.* 393.

8 *E.* 2. Enter 75. 24 *E.* 3. 40. 38 *Aff.* p. 26. 11 *H.* 4. 11. 7 *H.* 5. 3. 36 *H.* 6. Dower 30. fo. 241. a. *le heire endow la feme de le disseisor &c.*

If there be Lord, Mesne and Tenant, the Mesne doth grant to the Tenant, to acquit him against the Lord and his heirs, the Lord dyes, his wife hath the Seigniorie assigned to her for her Dower, and distraineth the Tenant; albeit the grant was to acquit him against the Lord and his heirs onely, yet because she continued the estate of her husband, and the reversion remained in the heir, this grant of Acquittal did extend to the wife, 31 *E.* 1. *Mesne* 55. *Nota &c.*

If after the dying seised of the disseisor, the disseisee abate, against whom the wife of the disseisor recover by confession

feffion in a Writ of Dower, in that case though the discent be avoided, yet the disseisee shall not enter upon the Tenant in Dower, because the recovery was against himself: but if he had assigned Dower to her in *pais*, some say he should enter upon her.

Donor in Tail reserves 20 s. rent, and dyes, the Donee takes wife, and dyes without issue, the heir of the Donor enters and endows the wife, she is so in of the estate of her husband, that albeit the estate Tail be spent, and the rent reserved thereupon determined, yet after she be endowed, she shall be attendant to the heir, in respect of the said rent.

And so it is of Lord and Tenant, the wife that is endowed, shall be attendant for the due services; but if any services be incroached, albeit that incroachment shall binde the heir, yet the wife shall be Contributory but for the services of right due, 10 E.3.26.

*Nota*, albeit the disseisor after a discent taketh to him but an estate for life; yet when the disseisee doth enter upon him, he shall thereby devert the reversion, for a Freehold is that whereupon a *Præcipe* doth lie; and therefore the entry of the disseisee is as available in Law, as if he had recovered it in a *Præcipe*. And so it is if a disseisor make a lease for life, and grant the reversion to the King, &c. 25 E.3.48. Pl.C.553. Vide S.302,388.

*Seft. 394.*

*Si un feme seisie de terra en fee, dont jeo aye droit & title dent. prent baron, & ont issue enter eux & puis la feme devie seisie, & apres le baron devie, & lissue enter, &c. en cē case jeo poy enter sur le poss. lissue, pur ceo que lissue ne vient a les tenements immediate par discent apres la mort. sa mere, &c. eins per le mort. del pier,*

9 H.7.24.37 H.6.1. An immediate discent may take away an entry for a time, and immediately may be avoided by matter *ex post facto*. But if a dying seised, take not away the entry of him that right hath at the time of the discent, it shall not by any matter *ex post facto* take away his entry. If a dissei-

for

for make a gift in Tail, the remainder in fee, and the donee dyeth without issue, leaving his wife *privement enceint* with a Son, and he in the remainder enters, and after the Son is born who entered into the land, this discent shall not take away the entry of the disseisee; because the issue cometh not to the lands immediately by discent &c.

*Señ. 395.*

*Disseisor enfeoff son quier en fee, & le pier mor. seise, &c. cène tolla entry &c. Reg.* it is true, that albeit a discent be cast, and the entry of the disseisee taken away, yet if the disseisor cometh to the land again, either by discent or purchase, of any estate of freehold which is implied in the (&c.) the disseisee may enter upon him, or have his Assize against him, as if no discent or mean Conveyance had been, *quia particeps criminis.*  
 237. 15 E.4.23.a. 11 E.4.2. 18 E.4.25.a. 33 H.6.5.b. 34 H.6.11. 12 H.8.9. 24 H.8.3.9. 18 H.8.5. 5 H.7.29. Ass. 54. 39 E.3. 25,26.

*Señ. 396, 397.*

258 Note, that *Ass. mort. Antecess. non tenet inter conjunctas personas sicut fratres & sorores &c.* for these are privy in blood, *Brac. l.4.f.261,282. 29 Ass. 11. F.N.B. 196.b.*

257 Albeit the eldest son hath issue and dye, and after the youngest son or his heir enter, and many discents be cast in his line, yet may the heirs of the eldest son enter in respect of the privy of the blood, and of the same claim by one Title; but otherwise it is if the Feoffee of the youngest son dye seised &c. and admit that the youngest son be of the half blood to his brother, yet he is of the whole blood to his Father; and therefore if he enter by abatement (and so gain a fee simple) and dye seised, it shall not barre his elder brother of his entry. But if the eldest son enter, and gain an actual possession and seisin, then the entry of the youngest is a disseisin, *Br. ent. 27.*

*Si le puisne frere ent. apres le mort. le pier & mor. seisin &c. leign. frere poit ent. sur l'issue, &c. par ceo que ambiz. les freres claime*

*clame per m. le tite, auterment ē ou leigne frere ent. &c. & puis  
ē dissein per le puisne frere, que mort. seisee &c.*

If the Father make a lease for life, and hath issue two Sons and dyeth, and the Tenant for life dye, and the yongest Son Intrude, and dye seised, this discent shall not take away the entry of the eldest: But if the Father had made a lease for years, it had been otherwise; for that the possession of the lessee for years maketh an actual freehold in the eldest Son. *Fol. 243. a. 22 E. 4. 4.*

If two Coparceners be, and they severally present to the Ordinary, yet the Church is not litigious, because they claim <sup>256</sup> all by one Title. *Doe and St. cap. 30. fol. 117.*

If upon a Writ *ad diem clau. extr.* the yongest Son be found heir, the eldest Son hath no remedy by the Common Law, because they claimed by one Title; but otherwise it is if they claim by several Titles. But this is now holpen by the Statute of *2 E. 6. c. 8.*

If two Parsons be in debate for Tythes which amount to above the fourth part, and one man is Patron of both Churches, no *Judicavit* doth lie, for that both Incumbents claim by one and the same Patron, *2 H. 7. 12. a.*

There is a great diversity holden in our books, where one hath a colour or pretence of right, and when he hath none <sup>259</sup> at all, *2 E. 2. Bastar. 19. 21 E. 3. 34. 22 Aff. 85. 11 E. 3. Aff. 88. 21 H. 6. 14. 11 E. 3. Age 3. Sect. 400.*

*Sect. 398.*

When one Coparcener enters generally, and taketh the profits, this shall be accounted in Law the entry of them both, and no divesting of the moiety of her siter, *21 Aff. 19. 21 E. 3. 7. 27. 32. 4 H. 7. 10. 16 H. 7. 4. fo. 243. b.*

If the privity of Coparcenary be once destroyed, a dying seised shall take away entry, &c. *28 Aff. 30. Vide S. 71 c.*

*Sect. 399.*

*Filius natus, vel filia nata ex iusta uxore, appellatur in legibus Angliæ filius mulieratus, seu filia mulierata.* *Glanvil, lib. 2. ca. 2. Bract. 5. ca. 10. Brit. ca. 70.* *Bastar*

*Bastardus dicitur à græco verbo Bassaris, i. Meretrix seu concubina. Vnde S. 188. Fleta l. 1. c. 5. vide S. 380.*

*Manferibus scortum, noibo mæchus dedit ortum.*

*Ut seges è spica, sic spiritus est ab amica.*

If the husband be within the four Seas, and the wife hath issue &c. in that case, *filiatio non potest probari. Bract. lib. 4. fo. 278, 279. 7 H. 4. 9. 43 E. 3. 10. 29 Aff. 54.*

If the issue be born within a moneth, or a day after marriage, between parties of full lawful age, the childe is legitimate, 18 E. 4. 28. fo. 244. 7.

268 It is holden, that the mulier be within age at the time of the dying seised (of the Bastard) that nevertheless he shall be barred, because the issue of the bastard is in judgement of Law become lawful heir, and the Law doth prefer legitimation before the priviledge of infancy, & *justum non est aliquem post mortem facere bastardum, qui toto tempore vitæ suæ pro legitimo habebatur*, 5 E. 2. Discent. Br. 49. 31 Aff. 18. 22. Pl. Com. Stowels case, 10 E. 3. 2.

If a man hath issue a Son being bastard eigne, and a daughter, and the daughter is married, the Father dyeth, the son entreth and dyeth seised, this shall barre the feme covert, 13 E. 1. Bast, 28. and the discent in this case of Services, Rents, Reversions expectant upon estates tail, or for life, whereupon rents are reserved, &c. shall binde the right of the mulier, but a discent of these shall not drive them that right have to an action, 14 E. 2. Bast. 26. So if the bastard dye seised, and his issue endoweth the wife of the bastard, yet is not the entry of the mulier lawful upon the Tenant in Dower for his right was barred by the discent, Sir Ri. Ledjords case, lib. 8. 101, 102.

256 Aff. Mortdanc. lieth not between the bastard and the mulier in respect of the proximity of blood, and the bastard being impleaded or vouched shall have his age, 21 E. 3. 34. b. 30 Aff. P. 7. 11 E. 3. Age 3. 5 H. 7. 2.

Sect. 400.

At a Parliament holden 20 H. 3. for that to certifie upon the



the Kings Writ, that the son born before mariage is a Bastard, was Contra Com. formā Ecclesiæ; Rogaverunt omnes episcopi, magnates ut consentirent quod nati ante Matrimonium, essent legitimi, sicut illi qui nati sunt post matrimonium quantum ad successionem hæreditariam, quia Ecclesia tales habet pro legitimis: Et omnes Comites, & Barones una voce respondent, Quod nolunt leges Angl. mutare, quæ huc usque usitate sunt & approbatæ. Stat. de Merton cap. 9. Bract. l. 5. fo. 410. 417. 10. Ass. pl. 10.

Note, that the law more respecteth him, that hath a colourable title, though it be not perfect in Law, than him that hath no title at all. *Vide S. 39.* 257

*Sect. 401.*

Est diversity lou Bastard continue la possession tous sa vie sans interruption, & lou le mulier enter & interruption. le possession de tiel Bastard. Reg. none shall enter but the mulier, or some other by his commandment. M. 38. & 39. El. Com. Banco, *Vide* 31 H 8, *ent. cong.* Br. 23.

*Omnis vati habitio reitrotrahitur, & mandato aequiparatur.* 4 H. 7. ca. *Vide* Sect. 334.

But in the case of the Bastardeigne, Gardein en Socage, or gardein in Chivalry may enter, for they are no strangers.

If an Infant make a Feoffment in fee, an estranger of his own head cannot enter to the use of the infant, for the State is voidable. But where an infant, or a man of full age is disseised, an entry by a stranger of his own head is good and vesteth presently the estate in the Infant or ether disseisee. So it is if Tenant for life make a Feoffment in fee, an estranger may enter for a forfeiture in the name of him in the reversion, and thereby the estate shall be vested in him. P 39. El. Com. Banco per Cur. 10. H 3. 16, 7. E 3. 69, 6. E 3. 64. per Thorp.

If the Mulier enter upon the Bastard, and the Bastard recover the land in an Ass. against the Mulier, now is the interruption avoided, and if the bastard die seised, this shall barre the Mulier.

The possession of the King when he hath no cause of seizure shall be adjudged the possession of him for whose cause he seised. 2. Aff. 9. fo. 245. b. *Vide*, &c.

And note, that the bastard must enter *in vacuam poss.* and continue during his life, without interruption made by the Mulier. Acts without words, may make an entry, but not words without an act, *viz.* an entry, &c. Pl. 9 I. Parson de *Honiawes* case. 35. H. 6. 24. 1 E 3. 21 E 4. 3 21. E 4. 5. 5. E 60. 21. H. 6. 9.

*Sett.* 402.

258 Null laches ser. adjudge en un Infant, lou discent è eschue durant son nonage. 33. E 3. qu. imp 46. But in some other cases Laches shall prejudice an infant, as if he present not to a Church within six moneths; for the Law respecteth more the priviledge of the Church (that the cure be served) than the priviledge of Infancy; and so the publike repose of the Realm concerning mens Freeholds and inheritance shall be preferred before the priviledge, &c. in case of a Fine where the time begins in the time of the Ancestor. Pl. 372. So non-claim of a villeine, of an infant by a year and a day, who hath fled into Ancient demesne, shall take away the seizure of the infant; and if an infant bring not an appeal of the death of his Ancestors within a year and a day, he is barred of his appeal for ever, for the law respects more liberty and life, than the priviledge of infancy; and note, that Littleton putteth his case, that an Infant shall enter upon a discent, when a stranger dyeth seised, but he put it not so before in the case of the Bastardeigne. B. Tenant in taile, incoffes A, in fee, A. hath issue within age and dyeth; B. abateth and dieth seised, the issue of A. being still being within age, this discent shall bind the infant; for the issue in taile is remitted, and the Law doth more respect ancient right in this case, than the priviledge of an infant that had but a defeasible estate. 11. E. 4. 1. 2. F. N. B. 35. (35) m. And it is said, if the King die seised of lands, and the land discent to his successor, that this shall bind an Infant, for that the priviledge of an infant

Infant in this case hold not aginst the King. 35. H. 6. 60.  
Fo. 246. a.

Seft. 403.

*Si bar. & feme come en droit sa feme ont title & droit denter,*  
*&c. & tenant del terre mor. seisie, &c.* These words are gene-  
rall, but are particularly to be understood, viz. when the  
wrong was done to the wife during the Coverture; for if a  
feme sole be seised of lands in fee, and is disseised, and then  
taketh husband; in this case the husband and wife, as in the  
right of the wife, have right to enter; & yet the dying seised  
of the disseisor in that case shall take away the entry of the  
wife after the death of her husband, and the reason is as well  
for that she her self when she was sole might have entered &  
recontinued the possession; as also it shall be accounted her  
folly, that she would take such a husband, which would not  
enter before the discent. 9 H. 7. 24. a. 2. E. 4. 25. 7 E. 4. 7. b. 15.  
E. 4. Discent 30. *Negligentia semper habet infortunium comitem.*  
*Laches le baron ne turnara la femme, &c. a prejudice* Note a di-  
versity, albeit reg. No Laches shall be accounted in infants  
or feme Coverts, as is aforesaid, for not entry or claime to  
avoid discent, yet Laches shall be accounted in them, for no  
performance of a condition annexed to an estate of land. For  
if a feme be infeoffed either before or after marriage reser-  
ving a rent, and for default of payment a re-entry, In that  
case the Laches of the baron shall disherit the wife for ever.  
20. H. 6. 28. b.

And so it is of an Infant, his Laches for not performing of  
a condition annexed to a State either made to his Ancestor  
or him selfe, shall bar him of the right of the Land for ever.  
31. Aff. p. 17. 2. E. 31. Pl. Com. 55. 10. H. 7. 13. H. 7. 35. H. 6. 41.  
Pl. 136. b. Fleta lib. 2. ca. 50.

If a man make a Feoffment in fee to another reserving a  
rent, and if he pay not the rent within a month, that he shall  
double the rent, and the Feoffee dyeth, his heire within age,  
the Infant payeth not the rent, he shall not by this Laches  
forfeit any thing. But otherwise it is of a feme covert, and

the reason of this diversity is, for that the Infant is provided for by the Statute. *Non current usua contra aliquem infan-  
tiam existens, &c.* Stat. Mert. ca 5

But that statute doth not extend to a condition of a re-  
entry, which the Infant ought to performe, &c.

## Sect, 405

If an idiot make a Feoffment in fee, he shall in pleading never avoid it, &c. But upon an office found for the King the King shall avoid the Feoffment, for the benefit of the Idiot whose custody the Law giveth to the King. 30 H., 42, b Abb, 5, E 3. o. Brit. c 28 fo. 36. 25, Aff, p, 4, 35. Aff, p, 10 32. E 3 scire fac. 100. Stanf. pr, 4.

Vpon all which books, there have been four severall opi-  
nions concerning the alienation, or other act of a man that  
is *non compos mentis*, &c.

1. That he may avoid his own act by entry, or plea.

2. That he may avoid it by writ, and not by plea.

3. That he may avoid it either by plea, or by writ; and  
of this opinion is Fitzb. in his N, B, 101.

And 4. Littleton here is of opinion, that neither by plea,  
nor by writ, nor otherwise he himselfe shall avoid it, but his  
heire (in respect his Anc. was *non comp.* &c,) shall avoid it by  
entry, plea, or writ, for it is a maxime of the Common  
Lawes, that the party shall not disable himselfe. Lib. 2. fo.  
126, 127. Beverl'es case. But this holdeth onely in civil  
causes for in criminal causes, as felony, &c. the act of wrong  
of a mad man, shall not be imputed to him, for that in those  
causes, *actus non facit reū, nisi mens sit rea, et, furiosus solo su-  
rore pun tur*. And so it is of an Infant untill he be of the age  
of 14. Fo, 147 b *alienation by him or woman*  
*and as he is not compos his heire*

Also if the Father disleile the Grandfather, and make a  
Feoffment in fee. (&c) without warranty, the Grandfather  
dieth, albeit the right descend to the Father, yet he cannot  
enter against his own Feoffment; but if he die, his Son shall  
enter and avoid the State of the Feoffee 16, Aff, 27, 21, H, 7,  
31, Stanf. 16 b 8, E 3, 2, Coron, 413, 414, 351, 22 E 3 ibid, 12, 1, 2

H.7,2,3,E,3. enter Cong. Statbam.12,E,4,8.39.H,6.4 Abbr as  
89.33.H.6.43. 15.E. Discent 30.

If Land is given to two, and to the heirs of one of them,  
he that hath the fees, shall not have an action of waste upon  
the Statute of *Gloc.* against the joynt tenant for life, but his  
heir shall maintaine an action of waste against him.

Sect. 406, 407, 408.

A *Dum fuit infra etat'* lyeth as well for the Ancestor him-  
selfe after his full age, as for his heir.

And note, where an *Infant* disseisor aliens the lands in  
fee, that if the discent be cast, the Infant being within age,  
he may enter at any time, either within age or after his full  
age. And so it is if an Infant make a feoffment &c. he may  
enter &c, and so in both cases may his heir, 43 E, 3, Enter  
cong, vet N, B, 126, b, F, N, B, 192. 45 E, 3, 21.

Sect. 409. fol. 284.

Tenant in *Capite* makes a Feoffment in fee to the use of the  
feoffee and his heirs, until the feoffor pay 100 l. to him or  
his heirs, the feoffee dyeth, his heir within age; now hath  
the King the Wardship of the body, and is intruded to the  
guard of the land. But if the feoffor pay the 100 l. ac-  
cording to the limitation, the Wardship is devested, both  
for the body and the land: and so it is in case of a Condi-  
tion, for the discent which is the cause of Wardship, is utter-  
ly defeated; and, *Cessante causa, cessat causatum*, Dyer 13 *Eliz*  
fo. 298 299. So as there is no difference, where the discent  
is disaffirmed by a Right Paramount as where the estate was  
never lawful (as in the case of an Infant) and where the di-  
scent is affirmed for a time, the estate being lawfull and be-  
ing after defeated by matter *ex post facto*, by a Title of re-  
entry. 255

Sect. 410.

Disseisor ad issue & enter en Religion &c. This discent shall  
not barre the entry of the disseisor, for that the discent  
cometh

Q 3

cometh by the Deed of the Father. And the Law respects the original act and that is his entry in o Religion, which is his own act, whereupon the profession followeth, whereby the discent happened, for *Cuiusq; rei potissima pars principium est.* And, *Origo rei inspicere debet*, Pl. Dame Hales Cases 6 E. 3. 4. 8c.

But it is said in the case of a bastardeigne, and Mulier puissn., such a discent shall binde the Mulier, and such an heir by discent shall have his age, 10 E. 3. 55, fo. 248. b.

*Nota*, if a man be Tenant or Defendant in a real or personal Action, and hanging the suit, the Tenant or Defendant enter into Religion; by this the Writ is not abated, because it is by his own act. And so it is of a Resignation, but otherwise it is of a Deposition or Deprivation, because he is expelled by Iudgement, and yet his offence &c. was the cause thereof. *Sed in presumptione legis, iudicium redditur in invitum*, 18 E. 4. 19. 9 E. 3. 25. 52. 7 E. 4. 15. Bract. lib. 4. fol. 189.

## Sect. 411.

No discent or dying seised can be of a Chattel.

A man seised of an Advowson in fee, grants three Avoidances one after another, and after the Church becomes void, and the Grantor presents, and his Clerk is admitted and instituted, and after the Church becomes void again, the Grantee may present to the second Avoidance, for that he was not put out of possession thereof; for as the lessor having the Freehold and Inheritance, cannot dispossess his lessee for years, having but a Chattel, that any discent may be cast, to take away his entry: so in the said case the Grantor hath the Franktenement and the Fee of the Advowson rightfully, so as he cannot make any usurpation, to give in any estate, &c. Also in respect of the privity, &c. the usurpation of the Grantor not put the Grantee out of possession for the two latter Avoidances, Hill. 18 El. Com. Banco.

*Claim daver terres par terme d'ans, nest pas expn'sment de le franknement del heire que est eins per discent.*

*Sect. 412, 413.*

Time of Peace is the time of Law and Right; and time of War is the time of Violent Oppression, which cannot be resisted by the equal Course of Law, *Cum silent leges inter arma*, fo. 247. b.

Succession of Bodies Politique or Corporate, is in the 25<sup>th</sup> post, and the heir of the natural man is in the per, 7. E 3. 25. 2. 5 E. 3. 13. & 3.

A Body Politique is so called, because it is to take in Succession, framed (as to that capacity) by Policy; and it is also called a Corporation, or a body incorporate, because the persons are made into a Body, and are of capacity to take and grant, &c. And this body Politique or Incorporate may commence and be established three manner of ways, viz. by Prescription, by Letters Patents, or by Act of Parliament. Every Body Politique or Corporate is either Ecclesiastical or Lay; Ecclesiastical, either Regular, as Abbots, Priors &c. or Secular, as Bishops, Deans, Archdeacons, Parsons, Vicars, &c. Lay, as Mayor and Commonalty, Bayliffs and Burgesses, &c. Also every Body Politique or Corporate is either Elective, Presentative, Collative, or Donative; and again it is either sole, or aggregate of many; And this Politique &c. Body aggregate of many, is by the Civilians called *Collegium*, or *Universitas*, Lib. 3. fo. 73. Dean and Chapter of Norwich. 104.



## CHAP. VII.

## Continual Claim.

Sect. 414, &amp;c.

**S**i disseisee fait Continual Claim a les tenemenes in la vie le disseisor comment que le disseisor de vie seisee en Fee, & la terre descendist a son heire, encore puit le disseisee enter sur la possession le terre &c. Nul pot faire continnal claim mes quant il ad title devant &c. S 416. And yet in some cases a Continual Claim may be made by him that hath Right and cannot enter.

If Tenant for years, Tenant by Statute Staple, Merchant or Elegit, be ousted, and he in the reversion disseised, the lessor, or he in reversion may enter to the intent to make his Claim, and yet his entry as to take any Profits, is not lawfull during the Term: And the lessor or he, in the reversion in that case may enter to avoid a collateral Warranty, or the lessor in that case may recover in an Assize, and so (as some have holden) may the lessor enter in case of a lease for life, to this intent, to avoid a discent or a Warranty, *Dyer* 29 *El. Pl. Com.* 374. 15 *H* 7, 3, 4. *Jacobus Case.* 28 *H* 6, 28. S 442. 45 *E* 3, 21.

If the disseisee make continual Claim, and the disseisor dye seised within the year, his heir within age, and by Office, the King is entitled to the Wardship, albeit the entry of the disseisee be not lawful, yet may he make continual Claim to avoid a discent, and so in the like, 7 *H* 6. 40. *Con. Claim* 1 *Donclers Case*, 5 *E* 4, 4.

No continual Claim can avoid a discent, unless it be made by him that hath Title to enter, and in whose life the dying seised was, 22 *H* 6, 37. 9 *H* 4. 5. 4. 15. *E* 4, 22. 4.

Sect. 415. fol. 251. a.

A continual Claim may be made as well where the lands are in the hands of a feoffee &c. by Title, as in the hands of a Disseisor, Abater or Intruder by wrong.

Sect. 416.

Note, that a Forfeiture may be made by the alienation of a particular Tenant, either in *pais*, or by matter of Record.

1. In *pais* of lands and tenements which lie in Livery, where a greater estate is by livery, then the particular Tenant may lawfully make, where by the reversion or remainder is divested, *vide* S 561, 609, 610. 611, 17 El. Dyer 339. 16. El. Dyer 24.

A particular estate of any thing that lies in grant, cannot be forfeited by any grant in fee by Deed; for that nothing passes thereby, but that which lawfully may pass, 3 J. E 3. Devise 21, 15 E 4, 9. *vide* S 608.

But if Tenant for life or years of land, the reversion or remainder being in the King, make a feoffment in fee, this is a forfeiture, and yet no reversion or remainder is divested out of the King; and the reason is in respect of the solemnity of the feoffment by livery, tending to the Kings disherison, 35 H 6, 62. Tr. 32 El. in *Informat' de intrusion vers Re: binson. Exchequers.*

2. By matter of Record, and that by three manner of wayes: 1. By Alienation. 2. By Claiming a greater estate then he ought. 3. By affirming the reversion or remainder to be in a stranger.

1. By Alienation, and that either divesting, as by levying of a Fine, or suffering a Common Recovery of Lands, where by the reversion or remainder is divested: or not divesting, as by levying of a fine in fee, of an Advowson, Rent Common, or any other thing that lyeth in the grant: And of this Opinion is *Littleton* in our Books; and so note two diversities, 1. Between a grant by Fine (which is of Record) and

and a grant by Deed in *pais*; and yet in this they both agree, That the reversion or remainder in neither case is divested.

2. Between a matter of Record, as a Fine, &c. and a Deed recorded, or a Deed inrolled, for that worketh no forfeiture, because the Deed is the Original, 15 E. 4. 9.

2. By Claim, and that may be in two sorts; either Express, as if Tenant for life, will in Court of Record claim fee, or if lessee for years be ousted, and he will bring an Affize, *ut de libero tenemento*: or Implied, as if in a Writ of Right brought against him, he will take upon him to joyn the Misce upon the meer Right, which none but Tenant in fee simple ought to do. So if lessee for years do loose in a *Præcipe*, and will bring a Writ of Error, for Error in Process, this is a Forfeiture, 15 E. 4. 29. 36. H. 6. 29. 2 H. 6. 9, 4. El. Dyer. 9. H. 5. 14. 22 Aff. 31. 18 E. 3. 28. 16 A/s. 15.

3. By affirming the reversion or remainder to be in a stranger, and that either actively or passively.

Actively, by five manner of ways; as

1. Tenant for life pray in aid of a stranger, whereby he affirms the reversion to be in him.

2. If he Attorn to the grant of a stranger; and there note also a diversity between an Attornment of Record to a stranger, and an Attornment in *pais*, for an Attornment in *pais* worketh no Forfeiture.

3. If a stranger bring a Writ of entry *in casu proviso*, and suppose the reversion to be in him, if the Tenant for life confess the action, this is a forfeiture.

4. If Tenant for life plead covinously, to the disherison of him in the reversion, this is a forfeiture.

5. If a stranger bring an action of Waste against lessee for life, and he plead *Nul waste fait*, this is a forfeiture, or the like, 21 E. 3. 14. 21 5 E. 4. 2. 24 H. 8. Forf. br. 87. lib. 2. fo. 55, 56. Bucklers Case. 24 E. 3. 68. 1 H. 7. 15 A/s. 3.

Passively, as if Tenant for life accept a Fine of a stranger *Sur consens de droit come ceo*, &c. for hereby he affirmeth of Record, the reversion to be in a stranger, 3 M. Dyer 148.

270 Note, that the Right of a particular estate may be forfeit-

ed also, and that he that hath but a Right of remainder or reversion, shall take benefit of the forfeiture, as if Tenant for life be disseised, and he levy a Fine to the disseisor, &c. *fo. 152. a. 13 E. 4. 4.*

If Tenant for life make ale for life, or a gift in Tail, or a Feoffment in fee, upon Condition, and enter for the Condition broken, yet the Forfeiture remaineth. So it is of Tenant in Tail, *apud poffi v. d. tenant per le Curtesie &c.* Tenant for years, Tenant of a House Merchant &c. *39 Aff. 15. 43 E. 3. Entercock 3. 2. H. 5. 7. 29 E. 3. 16. 45 E. 3. 25.*

If Tenant for life in remainder make continuall Claim, and the Aliene of the first Tenant for life dye seised, then may he in the remainder for life enter, and the right of entry, which he gained by his entry, shall go to him in the remainder in fee, in respect of the priority of the estate. And so it is of him in the reversion in fee, in like case, for he is also privy in estate.

If Tenant in Tail, the remainder in fee, with garr. have Judgement to recover in value, and dye before execution, without issue, he in remainder shall sue Execution, for he hath right thereunto, and is privy in estate. So if a Seignory be granted to one by Fine, the grantee for life dyeth, he in remainder shall have a *per que servit*, for he hath right to the remainder, and is privy in estate,

*Stat. 47,*

It is not sufficient to tell one generally what he should do, but to direct him how, and in what manner he shall do it.

Note, that the entry of a man to recontinue his Inheritance or Freehold, must ensue his action for recovery of the same, *Mich. 14. 5 E. Rot. 1458.* in the Earl of Arundels Case, *lib. fo 252. b.*

But if a disseisor had letten severally three acres to three persons for years, there the entry upon of the lessees in name of all the three acres, shall recontinue and revert all the three acres in the disseisee, for that the disseisee might have

have had one Affize against the disseisor, because he remained Tenant of the Freehold for all the three acres, 7 Aff. 18. 1. E. 4. 10 36 H. 6. 27. 32 Aff. p. 1,

253 If I infeoffe one of one acre of ground upon Condition,  
268 and at another time I infe offe the same man of another acre  
301 in the same county upon Condition also, and both the Con-  
282 ditions are broken, an entry into one acre in the name of both is not sufficient, for that I have no right to the land, nor action to recover the same, but a bare Title. But an entry into one part of the land, in the name of all the land subject to one Condition, is good, although the parcels be several, and in several Towns. And so note a diversity between several rights of entry, and several Titles of entry, by force of a Condition, 11 H. 7. 25. D. er 16 El. 320.

*Ennosme de tout &c. dont il ad Title d'entry*; here in a large sense Title of entry is taken for a Right of entry.

If I buy an Affize of two acres, if I enter into one hanging the Writ, albeit it shall revest that onely acre, yet the Writ shall abate,; H. 7. 7. 4 E. 4. 19. 12 E. 4. 11. 2,

Sect. 418,

*Nota*, A man may make a feoffment of lands in another County, and make livery of seisin within the view, albeit he might peaceably enter and make actual livery, and so may he shew the Recognitors in an Affize the view of lands in another County: But a man cannot make an entry into lands within the view, where he may enter without any fear (for it is one thing to invest, and another to devest) 38 E. 3. 11, 38 Aff. 3, 60 253, 2.

If livery of seisin be made of parcel of the Tenements, &c. in one Town, in the name of all &c. All the said Tenements &c. pass by force of the said livery &c. *Agr. à minore ad majus*: if it be so in a Feoffment passing a new right, *à multo fortiori*, it is for the restitution of an ancient right, as the worthier and more respected in Law, which holdeth Affirmative. *Vide* S. 438.

Sect.

Sect. 419,

Fear of imprisonment sufficeth to avoid a Bond or a deed; 177  
for the Law hath a special regard to the safety and liberty of 235  
a man. But note a diversity between a Claim or an Entry  
into Land, and the Avoidance of an act or deed for fear of  
Battery, 4 E 4, 7. 11 H 4, 6:8 Affs, 25, vide S 434, 10, 2, cap,  
49. 13 H 11. Dures 2.

If a man hath Title to enter into any Lands or Tenements,  
if he dares not enter &c. for doubt of maiming &c. if hee  
goeth, and approach as near to the Tenements as he dare  
for such doubt, and by word claim the lands to be his; this  
entry in Law is as forcible in Law, as an entry in Deed; and  
upon such an entry in Law an Assize doth lie, as well as upon  
an entry in Deed; and such an entry in Law shall avoid a  
Warranty, &c. vide S 378. 11 H 6, 5.

But note a diversity here, between an entry in Law and an  
entry in Deed; for that a Continual Claim of the disseisee  
being an entry in Law, shall vest the possession and seisin in  
him for his advantage, but not for his disadvantage; And  
therefore if the disseisee bring an Assize, and hanging the  
Assize he make Continual Claim, this shall not abate the  
Assize, but he shall recover damages from the beginning: but  
otherwise it is of an entry in Deed. Vide S 442. Pl. Com.  
93. Parson of Honylanes Case.

*Arg. ab autor est fortissimum in lege. 38 Aff. p 13.*

Sect, 421, 422.

Where a Continual Claim shall devert an estate, in any o- 13  
ther person, in any lands or tenements, there he that maketh  
the Claim ought to enter into the land, or some part there-  
of: But where the Claim is to bring him that maketh it into  
actual possession, there a Claim within the view sufficeth; as  
upon a discent, the heir having the Freehold in Law, may  
claim land within the view to bring himselfe into actual pos-  
session: and in that sense is the opinion of Hull, and the  
Court to be intended, 9 H 4, 5, &c. But yet the entry in

to some parcel in the name of the residue is the surest way,  
*vide S. 177. & 11 H 6.* accord with *Li. 2/102* 51.

At the Common Law upon a fine or final judgement given in a writ of right, the party grieved had a yeare and a day to make his claime. So the wife or heire hath a yeare and a day to bring an appeale of death, &c. After judgement given in a real action, the plaintiffe within the yeare and day may have *habere fac. si am* and in an action of debt, &c. a *Capias, fieri fac* or a *L vari facias*.

A protection shall be allowed but for a year and a day and no longer, and in many other cases *Vid. S. 385. 426. 14 H 4. 36. 7. E. 3. 37. Pl. 356. 357. 367, Brit. fo. 45. b.*

*Señ. 423, 424. 426.*

Il covient a luy que fist claime, &c. de faire un cl<sup>r</sup> deins chesc' an & jour prochain apres chesc' claime fait durant la vie son adversarie, & d'auques a quecunque temps que son Adversary mor. Seisee son entry ne fer, toll per nul tiel discent. *Brit. fo. 209. Dy. 17. Eli. 345.*

Si disseisor mor. Seisee de in l'an & jour, &c. per que les tenements descend a son heire, en cē case l'enter le disseisee ē toll car l'an & le jour que airoit le seisee en tiel case, ne ferre pris de temps de title dent. a luy accrue, mes tant seulement del temps de claime per luy fait en le maner avantd. & pur cest conseil ferre tōne pur tiel disseisee pur faire son claime en auxi breve temps que il puissoit apres le disseisin, &c.

This in case of a disseisor is now holpen by the Statute of 31 H. 8. ca. 33. For if the disseisor dye seised within five years after the disseisin, though there be no cont. claim made, it shall not take away the entry of the disseisee, but after the five years there must be such continuall claime as was at the Common Law: But that Statute extended not to any Feoffee or donee of the disseisor immediate, or mediate, but they remain still at the common Law. *Vi. S. 385. 423.*



## Sect. 428, 429.

Item sicome è dit en les cases mises, lou home ad title dent, pur  
 caus dun disseisin, &c. mes la ley è, lou home ad droit dentr, par  
 case d'asc' aut title, &c. Here is implied abators or intru-  
 dors, and not only their disseisors, but the Feoffees or do-  
 nees of disseisors, abators, or intruders, or any other so long  
 as the entry is cong. and here title is taken in his large sense  
 to include a right. V. Sect. 650. and 659.

Sitenant in taile immediate puis tiel claime continua son  
 occupation en les tenements ceo è un disseisin, &c. a celuy  
 que fist tiel claime, & sic par consequé letenant adonques ad  
 fee simple.

## Sect. 430, 431.

The disseisee shall have an action of trespassse against the  
 disseisor, and recover his damages for the first entry with-  
 out any regresse, but after regresse he may have an action of  
 trespassse with a continuando, and recover as well for all the  
 mean occupation as for the first entry; and note that Little-  
 ton doth here include costs within dammages.

Ou il poit aver un breve sur lestat. 5 R. 2. ca. 7. Supposant par  
 son breve que son adversary avoit entry en les terres, &c. cel-  
 uy que fist le claime, &c. & par tiel action il recover ses dam-  
 mages, &c. i.e. that he shall recover dammages for the first  
 tortious entry, but not for the mean profits, though he  
 made a regresse. 37. H. 6. 35. 2 E. 4. 18. 21 E. 4. 5. 74. 38. Aff. 9.  
 44. E. 3. 20. 10. H 7. 27. Keilwey 1. b. And here note that altho  
 he shall recover his costs of suit. 2 E. 4. 24. b. 9. E. 4. 4. b. 16.  
 H. 7. 6. a. Fo. 257. a. One or more may commit a force, three  
 or more may commit an unlawfull assembly, riot or rout. A  
 multitude is not restrained to a certain number, but left to  
 the discretion of the Iudges. A writ of forcible entry is  
 grounded upon the Statute of 8 H. 6. ca. 9. and lieth where  
 one entreteth with force, or where he enters peaceably and  
 detaineth it with force, or where he enters by force, and  
 detaineth it by force; and in this action without any regresse  
 the

the plaintiffe shall recover treble damages, as well for the mean occupation, as the first entry by force of the Statute; and he shall recover treble costs also. 3 E 4-19, 24. F. N. B. 240. &c. 11 E 4. 11. b. H 7. 12. 22 H 6. 57.

237 If three or foure goe to make a forcible entry, albeit one alone use the violence, all are guilty of force. 10 H 7. 1.

Note that there is a force implied in Law, as every trespass, & *Rescous et disseisin* implyeth a force, and is *vi et armis*, and there is an actuall force, as with weapons, number of persons, &c. and when an entry is made with such actuall force, an action doth lie upon the said Statute. *Vide Sect.* 240, 24 H 6, 30.

## Sect. 433.

*Qui per alium facit, per seipsum facere videtur.*

If an infant or any man of full age have any right of entry into any lands, any stranger to the use of the infant, &c. may enter into the lands, and this Reg. shall vest the lands in them without any commandment precedent or agreement subsequent. But if a disseisor levy a fine with proclamation according to the Statute, a stranger without a Commandment, &c. within the five years cannot enter in the name of the disseisee to avoid the fine; and that resolution was grounded upon the construction of the Statute of 4 H. 7. ca. 24. But an assent subsequent within the five years should be sufficient, *omnis enim ratihabitio* &c. 7 E 3, 69, 11. Ass p 11, 19. Ass p, 18, 10 H 7, 12. a. 3. H 8. entry *conque et faux recovery* 39. lib. 9. fo. 106 a. L. Audeleyes case 45 E 3. Release 18. and Breve 589, 20 E 3. 62 par Thorp.

## Sect. 434.

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Reg. it is true that where a man doth lesse than the commandment or authority committed unto him, there the act is void; and where a man doth that which he is authorized to doe and more, there it is good for that which is warranted and

and void for the rest. *Impotentia autem excusat legem.* I. H. 4. 3. 12. Afs. 24. 26. Afs. 39. V. S. 419. 46. E. 3. petition 18. 33. H. 6. 8. *Lex non permittit aliquod inconueniens.*

Albeit the Recluse or Anchorite be shut up himself, &c. yet to avod a discent, he must command one to make claim, and such a recluse shall alwayes appear, Atturney in such cases, where others must appear in proper person. 43 E. 3. 8. b. 30. 2.

## Sect. 436.

*Quant homo est in prison & est disseise, & le disseisor mor seign &c.* The disseisee shall not be bound in this case, for that by the intendment of Law he is kept without intellgence of things abroad, and also that he hath not liberty to goe at large to make entry or claim, or seek counsell; and so note a diversity between a Recluse, who might have intellgence, and a man in prison. Pl. Com. 360. Stowels case.

But if he be disseised when he is at large, and the discent is cast during the time of his imprisonment, this discent shall bind him. 9 H. 7. 24. *Videlib. fo. 259. 2.*

## Sect. 437.

*Si tel que est en prison soit utlage en action de debt ou trespass, 278 ou en apual de Robbery, il reveria tiel utlage, per b. eve de error.*

Outlawries may be reversed; either by plea, or by writ of error. By plea when the defendant commeth in upon the *Caput belagati*, &c. he may by plea reverse the same for matters apparent, as in respect of a *supersedeas* omission of processe, varience, or other matter apparent in the Record; and yet in these cases some hold, that in another term the defendant is driven to his writ of error. 2 E. 4. 1, 4 E. 4. 10. 21 E. 4. 73, 11 H. 7. 5, 21 H. 6. 50, 9 H. 4. 33. El. Dy. 192. 2 El. 176. 37. H. 6. 19.

But for any matters in fact, as death, imprisonment, service of the King, &c. he is driven to his writ of error, unless it be in case of felony, and there *in favorem vite*, he may plead it, But albeit imprisonment be a good cause to reverse an outlawry

outlawry, yet it must be by proceſſe of Law *in invitum*, and not by conſent or covin; for ſuch imprisonment ſhall not avoid the outlawry, becauſe upon the matter it is his own act.  
 264 8. H. 4. 7. 21 H. 7. 13. 39 H. 6. 1. 1 H. 7. 1. 1 E. 4. 2. 27 H. 8. 2. 38. Aſſ. p. 17. V. S. 439.

Sett. 438.

*Auxi ſi un recovery ſoit per default vers tiel que eſt en priſon, il avoidam le judgement per breve de error, &c.* For he ſhall have no writ of diſcent, becauſe the ſummons was according to law by ſummoners and veiors, and the land taken into the Kings hand by the Pernor. *Fleta. l. 6. ca. 67 & 24. W. 2 ca. 48 & E. 2. diſcent 51.*

*Defalta*, is legally taken for non appearance in Court.

There be divers cauſes allowed by law for ſaving a mans default. 1 By imprisonment. 2. Per inundationem aquarum. 3. Per tempeſtatem. 4. Per pontem fractum. 5. Per navigium ſubſtractum per fraudem petentis; non enim debet quis ſe periculis & infortuniis gratis exponere, vel ſubjacere. 6. Per minorem ætatem. 7 Per deſenſionem ſummonitionis per legem. 8. per mortem Attornati ſi tenens in temopre non novit. 9. Si petens eſſionatus ſit. 10. Si placitum mittatur ſine die, 11. *per breve de warr. Dicit. 3 H. 6. 46. 38. E. 3. 5. 12. H. 4. 13. 5 H. 7. 3. F. N. B. 17. 4 H. 5. challeng. 153. Br. Saver defendant 45.*

Legally records are reſtrained to the Rolls of ſuch only as are Courts of Record, and not the Rolls of inferior, nor of any other Courts which proceed not *ſecundum legem & conſuetudinem Angl.* 21. 79. b. m. 1. and 8. Dy. 242. 17 E. 3. 40. 11. H. 4. 26. b. 21 H. 6. 34 error Br. 73. 7 H. 7. 4. 19 Aſſ. 7. l. 4. fo. 54. *Rawlins caſe Brit. cap. 17. l. 6. fo. 11. Gentlemans caſe, and 30. 45. lib 7. fo. 30. l. 8. fo. 60 b and 67. a. fo. 260. a.*

406 During the term wherein any judiciall act is done, the Record remaineth in the breaſt of the Iudges of the Court, and in their remembrance, and therefore the roll is alterable during that terme, as the Iudges ſhall direct; but when the terme is paſt, then the Record is in the Roll, admits no alteration.

tion, averment or prooffe to the contrary, 7 H 6, 2, 19 H, 6, 6

If the Tenant or defendant be in prison, hee shall upon motion by order of the Court be brought to the barre, and either answer according to Law, or else the same being Recorded, the law shall proceed against him, and he shal take no advantage of his imprisonment 18, El. Dy. 353. 3. m. Dy, 129, Pl. 32, seignior Barkleyes case; 16. H 7, 11. b. 22. H 8, Record Br. 65, 19. H 6, 4, 3 El. Dy. 187. lib. 6, fo. 15. Edens case.

If a man in prison shall not be bound by a recovery by default, for want of answer in Court of Record in a reall action which is matter of record, *a multo fort.* a dicent in the Country which is a matter of deed, shall not for want of claime bind him that is in prison. Quod in minori valet, valebit in majori; & quod in majori non valet, nec valebit in minori. 7 H 6, 18, 8, H 6, 16. V. S. 418.

A man in prison by process of Law to be kept in *custodia & custodia*: but yet, *Carcer ad homines custodiendos, non ad puniendos dari debet.*

Sect. 439.

If a man be upon the Sea of England, he is within the Kingdome of England, &c. And yet *a tum mare* is out of the jurisdiction of the Common Law, and within the jurisdiction of the Lord Admiral, 6 R 2 Protection 46. V. S. 198. 440 441. 677.

And note, Littleton saith not, beyond the Sea, or *extra 4 Maria*, for a man *revera* may be *infra 4. maria*, and yet out of the realme of England.

But *infra 4. Maria*; or *extra*, is taken by construction to be within the realm of England, or dominions of the same. 3 R. 3. continuall claim 13. 4. E 3. 46.

If a man be out of the realm, and a recovery is had against him in a *praescriptio* by default, it seemeth that he shall not avoid the recovery; for by that meales, a man might be infinitely delayed of his freehold and inheritance, where of the Law hath so speciall regard; and few or none go over, but it is either of their own free will, or by sent, for what cause

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 soever, and he is not in that case without his ordinary remedy, either by his writ of higher nature, or by a *quod ei deforcat*. But outlawry in a personall action shall be avoided in that case, *quia de minimis non curat lex*, and otherwise he should be without remedy. V. 8. 437. and note the diversity between that case of the imprisonment, and this of being beyond Sea. Fo. 260 b nota, &c.

## Sect. 440.

Excusatur quis quod clameum non opposuerit, ut si de tempore litigii fuit ultra mare quacunque occasione. Verus & constans opinio. *Brac. l. 5, f. 436.* and 163. *Brit. fol. 21, v. 6. H 8, c. 18, 5 and 6 E. 6, ca. 11.*

By certificate a thing done beyond Sea may be tried. F. N. B. 196, 29. *Ass. 11. l. 7, f. 26, 27. Calvins case. Stat. 15 E. 3, de prodicionibus* doth declare, that it is treason by the common Law to adhere to the enemies of the King within the realme or without, if he be thereof proveablement a taint of *oberta fact*. and that he shall forfeit all his lands, &c. Certain it is, that for necessity sake the adherence without the realme must be alledged in some place within England; and if upon evidence they shall find any adherency out of the realme, they shall find the delinquent guilty, 5 R. 2, Tryall 54. 35. H. 8, ca. 2, fo. 241. b. \* *Dyer, 360, contr.* \* When part of the act, especially the originall is done in England and part out of the realme, that part that is to be performed out of the realme, if issue be taken thereupon, shall be tried there by twelve men, and those twelve shall come out of the place where the writ is brought: for example it was convenient by Indenture by charter party, that a ship should sail from Blackney haven in Norf. to Murrelin Spaine, and there to remain by certain dayes, 48 E. 3, 2, 1, H. 7, 16, 1 R. 3, 4.

In an action of Covenant brought upon this Charter party, the Indenture was alledged to be made at Thetford Norfolk, and upon pleading the issue was joyned, whether the said ship remained at Murrel &c. and it was adjudged That this issue should be tried at Thetford where the action

was brought, because there the Contract took his Originall  
&c. P 28 El. Constant, & Hughin, Ban, R 16, fo, 47, Dow-  
dals Case.

An Obligation made beyond the Seas, may be sued here  
in England in what place the Plaintiff will 2 E. 2, Oblig. 15,  
Whether Bourdeaux in France be in Iffington or no, is not  
traversable, Vide l fo, 261. b

If a man be disseised before he go over Sea, or cometh  
into the Realm again before the discent, the discent shall  
take away his entry

Sect. 441

By the Statute of 4 H. 7, cap. 14, five years after Procla-  
mations made upon the Fine, are given to him that right  
hath to make his claim, or pursue his action, where the  
Common Law gave him but a year and a day; but this Sta-  
ture extends onely to Fines, and not to Non-claim upon a  
judgement in a Writ of Right; and therefore the Statute  
of 2 E. 3, 16, which ousterh Non-claim, onely to Fines le-  
vied, extendeth not to a judgement in a Writ of Right to  
this day; and therefore the Common Law in that case re-  
maineth &c. viz. that claim must be made within a year and  
a day after judgement.

Also if a Fine be levied without Proclamations, or with-  
out so many as the Law requireth, then the Statute of Non-  
claim doth extend to such a Fine, l. 3, fo. 44, &c. Case del fines,  
l. fo. 95, Shelleys Case, l. 2, fo. 93, Bingham's Case, l. 8, f. 100,  
Lechfords Case, l. 91 f. 139, &c. Beaumands Case, l. 110. f. 19, b  
Lampson's Case, & 99, d. 19, f. 105, Margaret Podgers Case, l. 5.  
fo. 24, Saffins Case, l. 11, f. 96, Seymors Case, l. 8, f. 72, Greysleys  
Case, l. 11 f. 65, 71, 78, Pl. Com. Smith and Stapl. Case, Stone  
Case, and Howels Case. Bratt. 435, Brit. 216. fo. 263, a

*Fine finem in litibus imponit.*

A feme covert; also they in reversion or remainder expe-  
ctant upon any estate of Freehold, are holpen by the Statute  
of 4 H. 7, videl lib. fo. 262, b



## Sect. 442.

In a Writ of entry *sur disseisin* against one, supposing that he had not entry but by I. S. who disseised him, the Tenant said that I. S. dyed seised, and the land descended to him, and prayed his age: the Plaintiff counterpleaded his age, for that he arraigned an Assize against S. who dyed hanging the Assize, and he was ousted of his age, for that the bringing of the Assize amounted to a Claim, 24 E 3. 25. 9 E 2. Age 1.

If Tenant in Dower alien in fee with Warranty, and the heir in the reversion bring a Writ of entry in *Casu proviso* &c and hanging the plea, the Tenant dyeth, the heir shall not be rebutted or barred by this Warranty, for that the *Præcipe* did amount to a continual Claim, 3 E 3. Garr. 62. Fleta l. 6, c. 52, Bract. l. 5, fo. 436, Fo. 267, A. Nota &c.

If the goods of a Villain (before any seizure &c.) be distrained, the Lord may have a *Replevin*, and the very bringing of the Writ doth amount to a Claim of the goods and vesteth the property in the Lord, 33 E 3, Repl. 43, 42 E 3, 18. b, 9 H 25. *Nemo debet rem suam sine facto, aut defectu suamittere.*

## Sect. 443.

If an usurpation be had to a Church in time of vacation, this shall not prejudice the Successor to put him out of possession, but that at the next avoidance he shall present, F. N. B. 34 M. W. 2, c. 5. *imp. excus. &c.*

When there is no Dean or Mayor, the Chapter or Commonalty in that case cannot make claim, because they have neither ability nor capacity to take or to sue any action. But during the vacation of the Abathy of D. if a lease for life or a gift in Tail be made, the remainder to the Abbot of D. and his Successors, this remainder is good, if there be an Abbot made during the particular estate, 2 H 7, 13. 40 A 26. 34 E 2. Garr. 29. *Qu. de dubiis &c.*

*Inter cuncta leges, & perquirere doctos, Hor.*

*As, Collatio peperit artes, so Collatio perficit artes.*

*Crescente scientia, cresunt simul & dubitationes.*

*Autortias Philosophorum, Medicorum & Poetarum, sunt in causis allegande & tenenda, fo. 264.2.*

## CHAP. VIII.

### Of Releases.

SECT. 444.

**R**eleases are of two sorts, viz. a Release of all the right which a man hath either in lands and tenements, or in goods and chattels. Or there is a Release of actions real, of or in lands or tenements; or personal, of or in goods or chattels; or mixt, partly in the realty, partly in the personalty, *vide* S 492.

*Remis. Relax. & quiet. clamisse*, are proper words of Releases, and be much of one effect; besides there is *renunciare*, *Acquietare*, and there be many other words of Release, as if the lessor grants to the lessee for life, that he shall be discharged of the rent *vide* S 532.

Express Releases must of necessity be by Deed. Releases in Law are sometime by Deed, and sometimewithout Deed. As if the Lord disseise the Tenant, and make a Feoffment in fee by Deed or without Deed, this is a Release of the Seignior. And so it is if the disseisee disseise the heir of the disseisor and make a Feoffment &c, this is a Release in Law of the right. And the same Law is of a right in action, 27 H. 8.29. *Use* 34 H. 6.44. *Attaint*. 3 E. 3.38.21 E. 4.21. *Pl. Cam. de la mere*.

If the Obligee make the Obligor his executor, this is a release in law of the action, but the duty remains, for

the which the executor may retain so much goods &c. 8 E. 4. 3. 21 E. 4. 2.

If the feme Obligee take the Obligor to husband, this is a Release in Law. So it is if there be two femes Obligees, and the one take the debtor to husband, 11 H. 7. 4. 10 H. 7. 29 8 E. 4. 3.

If an infant make the debtor his executor, this is a good Release in Law of the action. But if a feme executrix take the Debtor to husband, this is no Release in Law; for that should be a wrong to the dead, and in Law work a *Devastavit*, which an act of Law shall never work. M. 30 & 31 Et. adjudged.

Note a diversity between a Release in Deed, and a Release in Law; for if the heir of the disseisor make a lease for life, his right is gone for ever. But if the disseisee doth disseise the heir of the disseisor, and make a lease for life, by this Release in Law the right is released but during the life of the lessee; for a Release in Law shall be expounded more favorably, according to the intent of the parties, then a Release in Deed, which is the act of the party, and shall be taken most strongly against himself, 30 E. 3. 24, 32 E. 3. 6. fac. 102.

270 *ius*, includeth not onely a right, but also any Title or Claim, either by force of a Condition Mortmain &c. for the which no action is given by Law, but onely an entry.

Sec. 446, fol. 265. 2.

*Null droit passa per un release; forsque le droit que le relefor ad al temps del release fait.*

Note, a man may have a present right, though it take effect in possession but *in futuro*: As he that hath a right to a reversion or remainder; and such a right he that hath it; may presently release, *Brit. fo. 101.*

The Baron makes a lease for life and dieth, the Release made by the wife of her Dower to him in reversion is good, albeit she hath no cause of action against him *in present*, 16 E. 3. Bar. 245. *Hors Case*, 5. part. fo. 70. 71.

If there be Grandfather, Father, and Son, and the Father dis-  
 seise the Grandfather and make a Feoffment in fee, the  
 Grandfather dyeth, the Father against his own Feoffment  
 shall not enter; but if he dye his Son shall enter. And so  
 note a diversity between a Release, a Feoffment, and a War-  
 rant: A release in that case is void; a Feoffment is good  
 against the Feoffor, but not against his heir; a Warrant is  
 good both against himself and his heirs. 39. H. 6. 43. 21. E. 4.  
 81. 9. H. 7. 1. 6. 2. E. 3. 38. 11. H. 4. 33.

Note three diversities, 1. Between a Power, and an Au-  
 thority. 2. Between Powers and Authorities  
 themselves. 3. Between a Right and a possibility, 43 E. 3.  
 17. 42 E. 3. 24. per Finchdem. 17 E. 3. 67.

As to the 1. If a man by his will devise, that his ex-  
 cutors shall sell his land, and die, if the executors re-  
 lease all their right and title to the heir, this is void; for  
 they have but only a bare Authority. And so it is if *cestuy  
 que use* had devised; that his Feoffees should have sold the  
 land; albeit they had made a Feoffment over, yet might  
 they sell the Use; for their Authority in that case is not given  
 away by the livery, 1. H. 7. 31.

As to the second, there is a diversity between such Powers  
 and Authorities as are only to the use of a stranger, and  
 nothing for the benefit of him that made the Release (as in  
 the case before) and a Power or Authority which respects  
 the benefit of the Releasor, as in these usual powers of re-  
 vocation, when the Feoffor &c. hath a power to alter, change,  
 determine or revoke the uses (being intended for his benefit)  
 he may release; and where the estates before were defeas-  
 ible, he may by his release make them absolute, and seclude  
 himself from any alteration or revocation, 1. 1. *Albans case*,  
 10. H. 6. 4.

As to the third; before Judgement the Plaintiff in an  
 action of debt releaseth to the Bail in the Kings Bench all  
 Demands; and after Judgement is given, this shall not bar  
 the Plaintiff to have execution against the Bail, because at  
 the time of the release he had but a meer possibility, and  
 neither

(1)  
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(3)

neither *Ius in re*, nor *Ius ad rem*, but the duty is to commence after upon a contingent, and therefore could nor be released presently.

So if the Conusee of a Statute &c. release to the Conusor all his right in the land, yet afterwards he may sue execution; for he hath no right in the land till Execution, but only a possibility, 25 Aff. p. 7. 27 E. 3. Execut. 130. P. 38. El. Rot. 5. 1. Borough and Grey.

## Sect. 447.

*En Releases de tout le droit que home ad en cert' terres, &c. il covient a ce'uy a que le release est fait en asc' case, que il ad le franktenement en les terres en fait, ou en ley al temps de release fait, &c.* This must be intended of a bare right, and not of a release of right, whereby any estate passeth as to a lessee for years, 49 E. 3. 24.

Also it must be intended of a right of Freehold at the least, and not to a right to any term for years, or Chattels real; as if lessee for years be ousted, and he in the reversion disseised, and the disseisor maketh a lease for years, the first lessee may release unto him, all which is implied in the first, &c.

Also in some case a Release of a right made to one that hath neither Freehold in deed nor in Law, is good; as the Demandant may release to the Vouchee, and yet the Vouchee hath nothing in the Land, for that when the Vouchee enters into the Warranty, he becomes Tenant to the Demandant, and may render the land to him in respect of the privity; but an estranger cannot release to the Vouchee, because *in rei veritate* he is not Tenant of the Land, 7 E. 4. 13. 20 H. 6. 29. 5 H. 7. 41. 18 E. 3. 12. 8 H. 4. 5. vide Sect. 490, 491.

And so it is if the Tenant alien hanging the *Præcipe*, the Release of the Demandant to the Tenant to the *Præcipe*, is good, and yet he hath nothing in the land, 20 E. 4. 14. 12. Aff. p. 41.

In time of vacation an Annuity that the parson ought to pay.

pay, may be released to the Parson in respect of the privity; but a release to the Ordinary onely seemeth not good, because the Annuity is Temporal, 8 E 3, 81. 46 E 3, 6. b, 21 H 7, 41.

If a disseisor make a lease for life, the disseisee may release to him; for to such a release of a bare right there needs no privity. But if the disseisor make a lease for years, the disseisee cannot release to him because he hath no estate of freehold. And yet in some case a right of Freehold shall drown in a Chawle, as if a feme hath a right of Dower, shee may release to the Guardian in Chivalry, and her right of Freehold shall drown, because the Writ of Dower doth lie against him, and the heir shall take advantage by it. And note, That by a Maxime, a right of entry or a chose in action cannot be granted or transferred to a stranger. *Mirr. cap. 2, § 17.* 216.

If a man be disseised of an acre of land, the disseisee hath *jus proprietatis*, the disseisor hath *jus possessionis*; and if the disseisee release to the disseisor, he hath *jus proprietatis & possessionis*, & Reg.

When a naked right to land is released to one that hath *jus possessionis*, and the other by a mean title recovers the land from him, the right of possession shall draw the naked right with it. For example; if the heir of the disseisor being in by descent, A. doth disseise him, the disseisee release to A. now hath A. the meer right to the land; but if the heir of the disseisor enter into the land, and regain the possession, that shall draw with it the meer right, &c. *Br. l. 2. f. 32. Britt. fa. 8. 121.* 312.

But if the Donee in Tail discontinue in fee, now is the reversion of the Donor turned to a naked right: if the Donor release to the discontinuée, and dye, and the issue in Tail recover the land &c. he shall leave the reversion in the discontinuée; for the issue in Tail can recover but the estate Tail onely, and the Donor cannot have it against his release; but if the disseisee enter upon the heir of the disseisor, and intcoff A in fee, & the heir of the disseisor recover the whole estate,

estate, that shall draw with it the meer right, and leave nothing in the Feeffee.

Another diversity is observable, when the naked right is precedent before the acquisition of the defeasible estate, for there the re-continuance of the defeasible estate shall not draw with it the preceding right, As if the disseisee disseise the heir of the disseisor, albeit the heir recover the land against the disseisee, yet shall he leave the preceding right in the disseisee. So if a woman that hath right of Dower disseise the heir, and he recover the land against her, yet shall he leave the right of Dower in her, 5 Aff. 1, 10 Aff. 16, 50 E 3, 7, 30 Aff. 14 E 3. Entry 56.

Another diversity is to be noted; when the meer right is subsequent, and translated by act in law, there albeit the possession be recontinued, yet that shall not draw the naked right with it; as if the heir of the disseisor be disseised, and the disseisor infeof the heir apparent of the disseisee, being of full age, and then the disseisee dyeth, and the naked right descends to him, and the heir of the disseisor recover the land against him, yet doth he leave the naked right in the heir of the disseisee.

So if the discontinuance of Tenant in Tail infeof the issue in Tail of full age, and then the discontinuance recover &c, yet he leaveth the naked right in the issue, 12 Aff. 41, 27 E 3, 84, 488. 23 H 8. *Restore al action* Br. 5. vide S 473, 475, 478, 487.

But if the heir of the disseisor be disseised, and the disseisee release to the disseisor upon Condition, If the Condition be broken, it shall revest the naked right. And so if the disseisee had entered upon the heir of the disseisor, and made a Profment in fee upon Condition, if he enter for the Condition broken, and the heir of the disseisor enter upon him, the naked right should be left in the disseisee. But if the heir of the disseisor had entered before the Condition broken, then the right of the disseisee had been gone for ever, 38 E 3, 16, 9 H 7, 24



Sect. 448,

Naturall seisin is the freehold in deed, and the civil the freehold in Law. Bract, l. 4, f. 206, 238, Bail, f. 83, b, Vide S 68c,

If a man levy a fine to a man Sur Com &c, Com, &c, &c, or a fine Su comsee de droit tantum, these be seoffments of record; 365 and the Comsee hath a freehold in Law in him before hee entreteth. 41 E. 2, 20, 103, H. 6, 14, 73, E. 3, 7, 8, 2 E. 3, 31.

Vpon an exchange the parties have neither freehold in Deed nor in Law, before they enter; so upon a Petition the freehold is not removed untill an entry, 11 H. 4, 61, 21, H. 7, 12.

If Tenant for life by the agreement of him in the reversion surrender unto him; he in reversion hath a freehold in Law in him, before he enter, 31 E. 3, Bar. 262, 41, H. 4, 13, H. 4, 5, 10.

Vpon a livery within view, no freehold is vested before an entry, 31 E. 3, 12, Fo. 266, b.

If a man do bargain and sell land by Deed indented, and in tollent the freehold in Law doth passe presently, and so when use, are raised by covenant upon good consideration. If a Tenant in a præcipe, being seised of Lands in fee, confess himselfe to be a villaine to a stranger, and to hold the land in villenage of him, the stranger by this acknowledgement is actually seised of the freehold, and inheritance without any entry, 17 E. 3, 77, 18, E. 4, 25.

Sect. 449, 450, 451 Fo. 267, a,

A release of all the right may be good to him in reversion, (or to him in remainder in deed, 7 E. 3, 51,) albeit he hath nothing in the freehold, because he hath an estate in him, 7 E. 4, 13, 14, H. 4, 32, b, 41, E. 3, 7, 49, E. 3, 28, case ult.

For he to whom a release is made of a bare right in lands and tenements, must have either a freehold in deed or in Law, in possession, or a state in remainder or reversion in fee, or fee taile, or for life,

But note that the state which maketh a man Tenant to the precipe, is said to be the freehold, 3, E 2, enter 7. F. N. B. 20, E.

Sect. 451. Fo. 267. b.

Note, that as a release made of a right to him in reversion or remainder, shall aid and benefit him that hath the particular estate for years, life, or estate taile: So a release of a right made to a particular Tenant for life, or in taile, shall aid and benefit him or them in remainder. *Sils ceo potest monstre.*

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The one cannot plead the Release made to the other, without shewing of it, for that they are privy in estate.

There is a diversity between severall estates, in severall Lands and severall estates in one land; for if two Tenants in Common of Lands, grant a rent charge of forty shillings, out of the same to one in fee, and the grantee release to one of them, this shall extinguish but twenty shillings, for that the grant in judgement of Law was severall: But if one be Tenant for life of lands, the reversion in fee over to another, if they two joyne in grant of a rent out of the lands, if the grantee release, either to him in the reversion, or to Tenant for life, the whole rent is extinguished; for it is but one rent, and issueth out of both estates.

Sect. 454. Fo. 268. a.

Note two diversities, 1 Between a Seigniorie or rent service, and a rent charge: for a Seigniorie or rent service may be released, and extinguished to him that hath but a bare right in the land, in respect of the privy, between the Lord and the Tenant in right; for he is not only as Tenant to the lord, but if he die, his heire within age, he shall be in ward and if of full age he shall pay reliefe, and if he die without heire the land shall escheat. / But there is no such privy in case of a rent charge, for there the charge lieth upon the Land.

The second diversity is between a Seigniorie, and a bare right

right to land : for a release of a bare right to land, to one that hath but a bare right, is void. But a release of a Seignior to him that hath but a right, is good to extinguish the Seignior.

*Nota* ; Seignior, rent or right, either in *presenti*, or in *future*, may be released five manner of *wayes* ; and the first three without any privity. 1. To the Tenant of the freehold in deed or in Law. 2. To him in remainder. 3. To him in reversion. The other two in respect of privity, as 1. Where the Lord releaseth his Seignior to the Tenant being disseised, having but a right and no estate at all. 2. In respect of the privity without any estate or right, as by the demandant to the vouchee, or donor to the donee, after the donee hath discontinued in fee. *vid. S. 455. l. 10. fo. 48. Lampet's case.*

If the Lord hath accepted services of the disseisor, then the disseisor cannot enforce the Lord to avow upon him, though his beasts be taken, &c. 20 H. 6. 9. b. 2 E. 4. 6. 3.

But some do hold, that if there be Lord and Tenant, and the Tenant be disseised, and the disseisee die without heir, the Lord accepts rent by the hands of the disseisor, this is no bar to him ; contrary it is, if he avow for the rent in Court of Record, or if he take a corporall service, as homage or fealty ; for the disseisor is in by wrong : but if the Lord accept the rent by the hands of the heir of the disseisor, or of his Feoffee, because they be in by title, this shall bar him of his escheat, which is to be understood of a descent or a Feoffment, after the title of escheat accrued ; for if the disseisor make a Feoffment in Fee, or die seised, and after the disseisee dieth without heir, then there is no escheat at all, because the Lord hath a Tenant in by title, 7 E. 6. escheat B. 18. P. N. B. 1440. 7. H. 4. 17, 2 H. 4. 8, 6 H. 7. 9. *vid. S. 556.* Upon the Statute, 21 H. 8. ca. 19. These four points are to be observed.

1. That the Lord hath full election, either to avow according to the Common Law, by force of the Statute, by reason of this word (May.)

a. Absit

2. Albeit the purview of the act be general, yet all necessary incidents are to be supplied, and the scope and end of the act to be taken; and therefore though he need not make his avowry, upon any person certain, yet he must allege seisin by the hands of some Tenant in certain within 40. years.

3. That if the avowry be made according to the Statute, every plaintiffe in the replevin, or second deliverance, be he Termor or other, may have every answer to the avowry that is sufficient; and also have aid, and every other advantage in Law, (disclaimer only excepted) for disclaimer he cannot, because in that case the avowry is made upon no certain person.

4. Where the words of the Statute be, if the Lord distreine upon the Lands and Tenements holden, yet if the Lord come to distreine, and the Tenant enchase the beasts which were within the view, out of the land holden, & there the Lord distreine; &c. in judgement of Law the distresse is lawfull, and as taken within his fee and Seigniorie, and the Statute being made to suppress fraud, is to be taken by equity *L. 9. fo. 136. Ascoughs case, 27 H 8. fo. 4. 32 H 8. ca. 2. l. 3. f. 26. Packhall case, 34 H 8. Avow. Br. 113. l. 9. f. 22, case avow. 11 H 7. 4. 34 H 6. 18. 16 E 4. 10. 21 H 7. 40.*

*Secl. 445. Fo. 269.*

Note a diversity between a release of a rent service out of Land, and a release of right to land. As if a Lease be made to (F.) one for life reserving to the lessor and his heirs a certain rent.

If the lessee be disseised; and after the lessor release to the lessee and his heirs all the right which he hath in the Land, and after the lessee enter, albeit in this case the rent is extinct, yet nothing of the right of reversion shall passe:

But admit that the Donee in tail, (in such case) make Prossment in fee, and the donor release unto him and his heirs, all the right in the Land, this shall exing with the reversion, because the Lord must avow upon him, and yet the Tenant

nant in Tail, after the Feoffment hath no right in the Land, but the reason is in respect of the privity, and that the donor is by necessity compellable to avow upon him only, &c. 1 H. 5. garr. 43. 14. H. 4. 38. l. 3. fo. 29. l. 6. 58. 10. E. 3. 26. 48. E. 3. 8. b. 31. E. 3. gard. 116. 5. E. 4. 37. E. 4. 27. 15. E. 4. 13. Trin. 18. E. 17. Sir Tho. Waits case in Com. Banco. Nota, &c.

Sec. 457, 458.

*Si veray Tenant que est disseisin seign. per service de chivalry & mor. (son heire eant deins age) le seign. avera & seism le gard del heire: mes si riel tenant fist Feoffment in fee, &c. auterment est.* 12 H. 4. 13. 36. E. 3. gard. 10. 6. H. 7. 9. 37. H. 6. 1. 32. H. 6. 27. 7. E. 6. gard. Br.

There be four manner of avowries for rents and services, &c. viz.

1. *Super verum tenentem*, as in the case here put.
2. *Supra verum tenentem in forma predicta*, as where a Lease for life, or a gift in tail be made, the remainder in fee.
3. Upon one as upon his Tenant of the Mannor, omitting (very) and this is when the Lord hath a particular estate in the Seignior, and so shall the donor upon the donee, or lessee upon the lessee.

4. *Sur la matter, en la terre*, as within his fee and Seignior. As where the Tenant by knights service maketh a Lease for life reserving a rent, and die, his heir within age, the gardain shall avow upon the lessee. 2 H. 4. 24. 12. E. 4. 42. 26. H. 6. avowry 17. 9. El. Dyer 257. 5. H. 7. 11. 7. E. 4. 24. 20. E. 3. avow 131. 47. E. 3. fo. ult. 38. H. 6. 23. Now by the Statute 21. H. 8. 12. 19. The very Lord may avow as in Lands within his fee and Seignior, without avowing upon person in certainty.

Note a diversity, if Tenant in Tail, make a Feoffment in fee, yet the right of the Tenant in tail remains, and shall descend to the issue in tail. But when the Tenant in fee simple make a Feoffment in fee, no right at all remains of his estate, but when the whole is transferred to the Feoffee. Also the Lord is not compellable in that case to avow upon the Feoffor, but if he will, as Littleton here saith, he may avow on

the Feoffee, but so it is not in case of tenant in tail, *Fol.* 269. *b.*

Note a diversity, (between actions and acts which concern the right, and actions and acts which concern the possession only; for a writ of customs and services lyeth not against the Feoffor, nor a release to him shall extinguish the Seigniorie. So if a rescous be made, an Ass. shall not lie against the Feoffor, and him that made the Rescous, because the Feoffee is Tenant and in Ass. the surplusage incroached, shall be avoided; for these actions and acts concern the right, but of a seisin and avowry which concern the possession, it is otherwise; and if the Lord release to the Feoffor, this is good between them, as to the possession, and discharge of the arerages, but the Feoffee shall not take benefit of it, for that, it extended but to the right. But the Feoffor shall plead a release to the Feoffee, for thereby the Seigniorie is extinct, as if the lessee for life doth wast, and grant over his estate, and the lessor release to the grantee, in an action of wast against the lessee, he shall plead the release, and yet he hath nothing in the land; and so in wast shall Tenant in Dower, or by the curtesie in the like case, and the vouchee, and the Tenant in *præcipe* after a Feoffment made, and so in a *contra formam collationis*.

*Nota, &c.* If there be Lord and Tenant, and the rent is behind for divers years, and the Tenant make a Feoffment in fee, if the Lord accept the service, or rent of the Feoffee due in his time, he shall lose the arerages due in the time of the Feoffor, for after such acceptance, he shall not avow upon the Feoffor, nor upon the Feoffee, for the arerages due, &c. But in that case if the Feoffor dieth, albeit the Lord accept the rent or service by the hand of the Feoffee due in his time, he shall not lose the arerages, for now the Law compelleth him to avow upon the Feoffee; and that which the Law compelleth him unto, shall not prejudice him. 4 E. 3. 22. 7. E. 3. 8. 7. E. 4. 27. 29. H. 8. *avow. Br.* 111. l. 3. fo. 64. 66. *Tennants case* 7. H. 4. 14. 2. E. 4. 6 3. 4. H. 6. 46. 47. E. 3. 4. *Vide lib. 6<sup>c</sup>.*

Sect. 459.

If a man make a lease for years, the Remainder for years; and the first lessee doth enter, a release to him in remainder for years is good to inlarge his estate. 22. E. 4. Surr. 6.

But if a lease be made to begin at *Michaelmas*, reserving a rent, and before the day the lesser release all the right that he hath in the land, this cannot enure to inlarge the estate, but to extinguish the rent in respect of the privity. M. 39. & 49 *El in Scacc.* Sir H. Woodhouse, and Sir Will. Paston. 296

A man grants the next avoidance of an advowson to two, the one of them before the Ch. become void (for after it becoms void, it is but a thing in action) may release to the other; for although the grantor cannot release to them to increase their estate, because their interest is future, and not in possession; yet one of them to extinguish his interest may release to the other in respect of the privity. P. 38. *El. Qu. imp. per Bennet, vers levesque* *Norwich in Com. Ban.*

Note that, seeing lessee for years hath *interesse termini*, before entry he may grant it over, albeit for want of an actual possession, he is not capable of a release to inlarge his estate, *Rel. Com. 423.* 58

But if a man make a release for life, the remainder for life and the first lessee dieth, a release to him in remainder, and his heirs, is good before he doth enter to inlarge his estate, for that he hath an estate of a freehold in Law in him.

Sect. 460. and 461.

A release to a Tenant at will is good, because between them, there is a possession with privity; but a release to a Tenant at sufferance is void, because he hath a possession without privity. 21. H. 6. 37. 2 E. 4. 6. b. 7. E. 4. 27. 8. 4. 16. 29. H. 6. *Rel. 4. Fo. 270. b.*

But if a man enter into Land of his own wrong, and take the profits, his words to hold it at the will of the owner cannot qualifie his wrong, but he is a disseisor, and then the release to him is good, or if the owner consent thereunto, then



he is a Tenant at will, and that way also the release is good. *Temps H 8 Tenant a. vol. 1. 5. 2. E. 4. 38. 12. E. 3. Aff. 86.*

But there is a diversity, when one cometh to a particular estate in land by the act of the party, and when by act in law; for if the Gardein hold over, he is an Abator, because his interest came by acts in Law. 10. E. 4. 9. 10.

Privy is fourfold. First, Privies in estate, as between the donor and donee, lessor and lessee, which privy is ever immediate.

2. Privies in blood, as the heir to his Ancestor, or between Coparceners, &c.

3. Privies in representation, as executors, &c. to the Testator.

4. Privy in tenure, as the Lord and Tenant, &c. which may be reduced to generall heads, Privies in Deed, and Privies in Law. Old N.B. 117. 137. l. 4. fo. 23. *Walkers case* l. 4. f. 123. &c. Vide S. 454.

*Seff. 462. and 463.*

V When a Feoffment is made to a future use, as to the performance of his last Will, the Feoffees shall be seised to the use of the Feoffor, and of his heirs in the mean time. And reason would, That seeing the Feoffment is made without consideration, and the Feoffor hath not disposed of the profits in the mean time, that by construction and intendment of law, the Feoffor ought to occupy the same in the mean time. And so it is when the Feoffor disposeth the profits for a particular time *in presenti*, the use of the inheritance shall be to the Feoffor and his heirs, as a thing not disposed of, 35. H. 6. *Subpœna* 22. 15. H. 7. 12. b. 37. H. 6. 36. 11. H. 4. 52. 7. H. 4. 22. 1. M. 11. Dyer.

And note a diversity between a Feoffment at lands at this day upon confidence, or to the intent to perform his last Will, and a Feoffment to the use of such person and persons, and of such estate and estates, as he shall appoint by his last Will; for in the first case the land passeth by the Will, and not by the Feoffment; for after the Feoffment the Feoffor

feoffor was seised in fee simple, as he was before, but in latter case the Will pursuing his power is but a direction of the uses of the feoffment, and the estates pass by execution of the uses which were raised upon the feoffment, but in both cases the feoffees are seised to the use of the feoffor and his heirs in the mean time, *l. 6. fo. 17, 18. Sir Edm. Cieres Case. fo. 271. b.*

Note, uses are raised, either by transmutation of the state, as by Fine, Feoffment, Common Recovery, &c. or out of the state of the owner of the land by bargain and sale, &c. or by Covenants upon lawfull consideration, *Dillon and Frayns case, l. 1. &c. fo. 113.*

There cannot be two uses in esse, of one and the same land.

But if A. disseise one to the use of B. and doth bargain and sell the land for money to C. C. hath an use, and here be two uses of one land, but of severall natures, the one, viz. upon the bargain and sale to be executed by the Statute, and the other not. But since *Littleton* wrote, all uses are transferred by Act of Parliament into possession, *27. H. 8. cap. 10.*

• Sect. 464. Fol. 271.2.

By the Statute of *2. H. 5. cap. 3. Stat. 2.* it is enacted, that in three cases, he that passeth in an Enquest, ought to have lands, tenements to the value of *40 s. viz.* 1. Upon Triall of the death of a man. 2. In Plea real between party and party. And 3. In Plea personall, where the debt, or (or and) the damages in the Declaration amount unto forty Marks, *28. H. 8. Dyer. fol. 9. 9. H. 5. fol. 5. 15. H. 7. 13. b. 5. E. 4. 7. a.*

The surest construction of a Statute, is by the rule and reason of the Common Law. Uses were at the Common Law.

When the Law gives to any man any estate or possession, the Law giveth also a privity, and other necessaries to the same.

Since *Littleton* wrote, the said Statute of 2. H. 5. is altered: for where that Statute limited 40. s. now a later Statute hath raised it to 4. l. and so it ought to be contained in the *Ven. fac.* 27. *El. cap. 6.*

*Nota.* An use is a trust or confidence reposed in some other, which is not issuing out of the land, but as a thing collaterall, annexed in privity to the estate of the land, and to the person touching the land, viz. that *Cesty que Use* shall take the profit, and that the Terre-tenant shall make an estate according to his direction. So as *Cesty que Use* had neither *jus in re*, nor *jus ad rem*, but only a confidence and trust, for which he had no remedy by the Common Law, but for breach of trust, his remedy was only by *Subpœna* in Chancery. *Fortescue cap. 25, 26 &c. Pl. Com. 352. b. in Dalameres case. & 349. b. l. 1. fo. 121 122, 127, 140. Chudleys case, l. 2. fo. 58, 78 l. 6 fo. 64. l. 7. fo. 13 & 34. Vide Fortescue ut ante &c.* How Jurors shall be returned, &c.

*Seff. 65. Fol. 273. a.*

293 It is a certain rule. That when a Release doth enure by way of enlarging of an estate, that there must be privity of estate, as between lessor and lessee, donor and donee, *Fleta l. 5. cap. 34. 15. H. 7. 14. 22. E. 4. 4.*

But a Release to him that *in rei veritate* (albeit there be privity in Law, and a tenancy in supposition of Law) hath no estate, cannot enure to him by way of enlargement, for how can his estate be enlarged that hath not any? *Vide Libr.*

If a Tenant by the Curtesie grant over his estate, yet he is Tenant as to an action of Waste, Attornment, &c. and yet a Release to him and his heirs cannot enure to enlarge his estate, that hath no estate at all.

If I grant the reversion of my Tenant for life to another for life, now shall not he have an action of Waste. But if I release to the grantee for life and his heirs, now he hath the Fee simple, and shall punish the Waste done after,

48. E.3.16.a. per *Persey* and *Finchden*, 41. E.3.17.a. 7 E.4. 17.

It is further to be observed, that to a release which enureth by way of enlargement of the estate, there is not only required privity and an estate, but sufficient words also in Law, to raise or create a new estate.

If a man make a lease to A. for term of the life of B. and after release to A. all this right in the Land, by this A. hath an estate for term of his own life, for a lease for term of his life is higher in Judgement of Law, then an estate for term of another mans life, *vide* 16. H.6. Release 45. 22. E.2. Rel. *Statham*.

*Nota*, when a Release doth enure by way of enlargement of an estate, no inheritance, either in fee simple or fee tail, can passe without apt words of inheritance: But there is a diversity between a Release that enureth by way of *Mitter lestate*, and by way of enlargement of the state, 9. El. Dyer 263.

If there be three joyntenants, and one release to one of the other all his right; this enureth by way of *Mitter lestate*, and passeth the whole fee simple without these words (Heirs.) But if there be two joyntenants, & the one release of them all his right to the other, this doth not to all purposes enure by way of *Mitter lestate*, for it maketh no degree, and he to whom the release is made, shall for many purposes be adjudged in from the first Feoffor, and this release shall vest all in the other joyntenant without these words (Heirs) 40. E.3. 41. 46 E.3. 19 H 6. 33 H.6. 5. 10 E.4. 3.

But if there be two Coparceners, and the one release all his right to the other, this shall enure by way of *Mitter lestate*, and shall make a degree, and without these words (Heirs) shall pass the whole fee simple.

And note, that to a release that enures by way of *Mitter lestate*, there must be privity of estate at the time of the Release, 37 H.8. *Alienat. Br.* 31. 8 H.4. 8. 40 Aff. 5. 19.

If two Coparceners be of a rent, and the one of them take the Terre tenant to husband, the other may release to

her, notwithstanding the rent be in suspense, and it shall enure by way of *Mitter lestate*, and she may release also to the Terre-tenant, and that shall enure by way of extinguishment. But if she release to her sister, and to her husband, it is good to be seen how it shall enure. \*

*Nota*, some releases do enure by way of enlargement of estate, some by way of *Mitter lestate*, some by way of *Mitter le droit*, by way of Entry and Revestment, and some by Extinguishment, *vide* *Liut.* fo 68, 69.

*Seft.* 467. *Fol* 274. a.

*Reg.* he that hath a fee simple at the time of the Release made of a right, &c. needeth not speak of his heirs; for a release of a right for a day is sufficient, &c. But if a man be disseised of two acres, he may release his right in one of them, and yet enter into the other, *vide* 6 E. 3. 17. *alias* 6. E. 3. 17. 12. E. 3. *disseised* F. 29.

444 So note a diversity, between a release of part of the estate of a right, and a release of a right in part of the Land.

Again, note two diversities, 1. Between the quantity of the estate in a right, and the quality thereof, for albeit the disseised cannot release part of the estate, yet may he release his right upon condition, 4. E. 2. Release 50. 43. Aff. 12. 17. Aff. 2. 31. Aff. Aff. 13 21. H. 24.

218 2. Diversity is between a right, which is favoured in Law, and a condition created by the party which is odious in Law, for that it defeateth estates; and therefore if a condition be released upon condition, the release is good, and the condition void, fo. 274. b.

7 An express Manumission of a Villain cannot be upon condition, for once free in that case, and ever free. Also an Attornment to a grantee upon condition, the condition is void, because the grant is once sealed. But this is to be understood of a condition subsequent, and not of a condition precedent; for in both cases the condition precedent is good. But Letters Patents of Denization made to an alien, may be either upon condition

condition subsequent or precedent, and so may the King make a Charrer of Pardon to a man of his life, upon condition as is abovesaid, *Rot. Parliament. 18.H.6.11.29. Ap Guilliams, case, 10.E.3.c.2.3. H.7.f.6.*

## Sect. 469.

*Lou home ad forsqe droit a la terre, & nad riens in le reversion ne in le remainder in fait; si tiel home release tout son droit a un que est tenant de le franktenement, tout son droit ale, comment que nul mention soit fait de les heires celuy a que le release est fait. To a release of a right, made to any that hath an estate of Freehold in Deed or in Law, no privy at all is requisite. Lessee for life letteth the same land over to another in fee; A release in this case by the first lessor to the lessee, doth not enure by way of *Mitter le droit*, for then should he have the whole right, but as it were by way of extinguishment in respect of him that made the release; and that it shall enure to him in the remainder, which is a quality of an inheritance extinguished, but yet the right is not extinct in deed.*

## Sect. 471. Fol. 275. b.

If a disseisor make a lease for life, the remainder in fee, albeit they to some purposes are as one Tenant in Law, yet if the disseisee release all actions to the Tenant for life, he in the remainder shall not take benefit of this release, for it extendeth only to Tenant for life, *l.8 fo.143. Edw. Althams Case.*

Also if the disseisor make a lease for life, and the disseisee release all actions to the lessee, this enureth not to him in the reversion. And so our Author is to be understood of a release of Rights, and not of a release of actions to the Tenant for life, as to or for the benefit of him in the remainder or reversion.

## Sect.

Sect. 472. Fol. 276.a.

If Tenant for life be disseised by two, and he release to one of them, this shall enure to them both, for he to whom the release is made, hath a longer estate then he that releaseth, and therefore cannot enure to him alone to hold out his Companion, for then should the release enure by way of Entry and grant of his estate, and consequently the disseisor to whom the release is made, should become Tenant for life, and the reversion revested in the lessor, which strange transmutation of estates in this case the Law will not suffer, 13.E.4. *Discent. F. 29.*

But if lessee for years be ousted, and he in the reversion disseised, and the lessee release to the disseisor, the disseisee may enter, for the term of years is extinct and determined. And so it is if Donee in Tail be disseised by two, &c. But if the Kings Tenant for life be disseised by two, and he release to one of them, he shall hold out his companion, for the disseisor gained but the estate for life. ) So if two joyn-tenants make a lease for life, and after to disseise the Tenant for life, and he release to one of them, he shall hold out his companion, for the disseisin was but of an estate for life.

If Tenant for life be disseised by two, and he in the reversion and Tenant for life joyn in a release to one of the disseisors, he shall hold out his companion, and yet it cannot enure by way of entry and Feoffment. But if they severally release their severall Rights, it shall enure to both the disseisors.

But here in *Littletons Case*, where Tenant in fee simple is disseised by two, and release to one of them; this for many purposes enures by way of entry and Feoffment, and therefore he to whom the release is made, shall hold out his companion, and be made sole Tenant of the fee simple. *Mer si un disseisor in feffa 2 &c. auerment est.* For that the Feoffees are in by Title, and are presumed to have a Warranty, which is much favoured in Law, and the disseisors are merely in by wrong, 21 H.6.41.



If two men do gain an Advowson by usurpation, and the right Patron release to one of them, it shall enure to them both, for seeing their Clerk come in by admission and institution, which are judiciall acts, they are not meerly in by wrong: for an usurpation shall cause a Remitter, *F. N. B. 31. M.*

But if a lease for life be made, the remainder for life, the remainder in fee, and he in remainder for life disseise the Tenant for life, and then the Tenant for life dieth, the disseisin is purged, and he in remainder for life hath but an estate for life. And so note a diversity where the particular estate for life is precedent, and when subsequent, *19. H. 6. 21. 38. H. 6. 28. Case de Occup.*

Where our Author putteth his case of one disseised, put the case that two joyntenants in fee be disseised by two, and one of the disseisees release to one of the disseisors all his right, he shall not hold out his companion, because the release is but of the moiety, without any certainty.

If a man be disseised by two women, and one of them take husband, and the disseisee release to the husband, this shall enure to the advantage of both the disseisors, because the husband was no wrong doer, but in a manner by Title.

If two disseisors be, and they make a Lease for life, and the disseisee release to one of them, this shall enure to them both, and to the benefit of the lessee for life also: for he cannot by the release have the sole possession and estate; for part of the estate is in another. And so it is if the disseisors make a lease for years &c.

But the mortgage upon condition having broken the condition, is disseised by two, the mortgager having Title of entry for the condition broken, releases to the one disseisor, albeit they be in by wrong, yet the release shall enure to them for two causes: 1. For that they are not wrong doers to the Mortgager, but to the Mortgagee; and by *Littletons* case it appeareth, that wrong is done to him that made the Release. 2. That he that makes the Release, hath but a Title by force of a condition, and *Littletons* case is of a right. 270  
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Like

Like Law is of an entry for Mortmain, or a consent to Ravishment, &c.

## Sect. 473.

304 Note, that a release by one whose entry is lawfull to him that is in by wrong, shall purge and take away all mean estates and titles.

If A. disseise B. who infeoff C. with warranty, who infeoff D. with warranty, and E. disseise D. to whom B. releases, this doth defeat all the mean estates and warranty, *causa qua supra*, 11. H.4.33. 9.H.7.25. 2.E.4.16. 21. E.4.78. 12. Aff.22. vide 3.H.6.38.

## Sect. 474. Fol. 276. b.

If the disseisor make a lease for life, and the lessee make a feoffment in fee, and the disseisee release to the Feoffee, this release shall take away the entry of the disseisor for the alienation which was made to his disinheretance, he having the inheritance by disseisin, so as he could have no warranty annexed to it, and Tenant for life forfeited his estate. But if the entry of the disseisee were not lawfull, it is otherwise; as the Book of 9.H.7.25. is, of an estate Tail, *mutatis mutandis*, Vide l. fo. 277. a.

## Sect. 475.

Abate. Vide N.B. 115. Brit. cap. 51. Bract. l. 4. cap. 2.

*Abatementum*, is an entry by interposition.

185 A *Disseisin* is a wrongful putting out of him that is actually seised of a Freehold, and *Abatement* is when a man died seised of an estate of Inheritance, and between the death and entry of the heir, an estranger doth interpose himself, and abate.

*Intrusion*, 1. properly is when the Ancestor died seised of any estate of inheritance expectant upon an estate for life; and then Tenant for life dieth, &c. and an estranger doth interpose himself and intrude.

2. He that enters upon any of the Kings demesns, and taketh

taketh the profits, is said to intrude upon the Kings Possessions, *F.N.B. 203. Fleta. l. 4. cap. 30. Pl. Com. case de Mynes.*

3. When the heir in ward enters at his full age without satisfaction for his marriage, the writ saith *quod intrusit*. *F.N. B. 141. F.*

*Deforciamendum*, comprehendeth not only these aforenamed, but any man that holdeth Land, whereunto another man hath right, be it by descent or purchase, is said to be a deforcer. 363

*usurpation* hath two significations in the common Law; one when an estranger that no right hath presenteth to a Church, and his Clark is admitted and instituted.

2. When any subject doth use without lawful warrant Royall franchises, he is ~~366~~ to usurp, &c.

*Purprestura* est, &c. generaliter quorundam aliquid sit ad nocumendum regii tenementi, vel regie vix (vel aliquarum publicar.) vel civitatis, &c. *Glanv. l. 9. ca. 11. Brit. fo. 28. 29.*

And because it is properly, when there is a house builded, or an inclosure made of any part of the Kings demesne, or of an high way, or a common street, or publike water, or such publike things, it is derived of the French word *Pourpris*, which signifieth an inclosure, but specially applyed, as is aforesaid by the common Law. *Sic nota differentiam inter disseisnam, Abatamentum, Intrusionem, Deforciamendum, & usurpationem, & purpresturam.*

*Seff. 476. Fo. 277. b.*

But if the Feoffee upon condition make a Feoffment in fee over without any condition, and the disseisee release to the second Feoffee, the condition is destroyed by the release, before the condition broken or after; for the State of the second Feoffee was not upon any express condition, as *Littleton* here putteth his case, and he may have advantage of the release, because it is not against his own proper acceptance, as *Littleton* speaketh in the next Section. *L. 1. fo. 147. Mayowes case.*

But if it be a wrongfull title, such a title is taken away by arelease. As if A. disseised B. to the use of C. B. release to A.

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A. this shall take away the agreement of C. to the disseisin, because it should make him a wrong doer, as if the disseisor be disseised, the disseisee release to the second disseisee, this taketh away the right of the first disseisor had against the second; and a relation of an estate gained by wrong, shall never defeat an estate subsequent, gained by right, against a single opinion, not affirmed by any other in our books 14. H. 8. 11. per Portm.

*Si disseisee release al Feoffee sur condition ceo namendra lestate le Feoffee, &c.*

Sec. 277. Fo. 478. a.

*Homo naverat advantage per un release que serre encontre son proper acceptance, & encontre son grant dem. & compr. que asc' ont dit que lou enter de home est congeable sur un tenant sil release a mes le tenant, que ceo avoit a le tenant, sicom il ust enter sur le tenant, & puis luy infeoffa, &c. ceo ne pas voier en chesc' cas. Car si le disseisee, ust enter sur le Feoffee sur condition & puis luy infeoffa donques est le condition tout defeat, mes il ne pas void per asc' nuel release sans entry fait, &c.*

If A. and B. be joynt disseisors, and B. grant a rent charge, and the disseisee release to A. all his right, A. shall avoid the rent charge, because it was not granted by him, and so not within the reason of our authour.

If two disseisors be, and they infeoffee another, and take back an estate for life or in fee, albeit they remain disseisors to the disseisee, as to have an Ass. against them, yet if he release to one of them, he shall not hold out his companion, because their state in the land is in by Feoffment.

If there be two disseisors, and they be disseised, and they release to their disseisor, and after disseise him, and then the disseisee release to one or both of them, yet the second disseisor shall reenter; for they shall not hold the land against their own release.

If a disseisee release to one of the disseisors to some purpose, this shall enure by way of entry and Feoffment, viz. as to hold out his companion. But as to a rent Charge granted

red by him, it shall not enure by way of entry and Feoffment, for if the disseisee had entred and enfeoffed him, the rent charge had been avoided,

But it is a certain rule, that when the entry of a man is congeable, and he release to one that is in by title (as hereto the Feoffee upon condition is, it shall never enure by way of entry and Feoffment, either to avoid a condition, with which he accepted the land charged, or his own grant, or to hold out his companion.

And where it appeareth by our authour that acts done by the disseisor shall not be avoided by the release of the disseisee; It is to be noted, that acts made to the disseisor himself, shall not be avoided by the alteration of his estate by the release of the disseisee, as if the Lord before the release had confirmed the estate of the disseisor to hold by lesser services, the disseisor shall take advantage of it, and so of estovers to be burnt in the house, and the like Law is of a warranty made unto him.

If an alien be a disseisor and obtain letters of denization, and then the disseisee release unto him, the King shall not have the land, for the release hath altered the estate, and it is as it were a new purchase, otherwise it is if the alien had been the Feoffee of a disseisor. Fo. 278. b.

If the Lord disseise the Tenant, and is disseised, the disseisee release to the second disseisor, yet the Seignory is not revived, for between the parties, the release enures by way of entry and Feoffment as to the land; but not having regard to the Seignory; and for that the possession was never actually removed, or revested from the disseisor, who claimeth under the Lord, the Seignory is not revived. But if the Lord, and the stranger disseise the Tenant, and the disseisee release to the stranger, there the Seignory by operation of Law is revived, for the whole is vested in the stranger, which never claimed under the Lord; and in that case if the Lord had died, and the land had survived, the Seignory had been revived.

Sec. 478. Fo. 479. a.

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Note, that where the Law in one case, doth give a man severall remedies and of severall kinds, there is a great art and knowledge for him to chuse his aptest remedy. 28.E.3. 98.9.E.4. 46. 21.E.4. 55. 41.E.3. 10. 2.H.4. 12. 41.E.3.

A man makes a gift in tail, the remainder in fee, Tenant in tail dieth without issue, an estranger intrudes, and he in remainder brings a Formedon, and recovered by default, and makes a Feoffment in fee, the intruder reverse the recovery in a writ of descit and entry, he shall detain the Land for ever, and the Feoffee shall not have a writ of right. And so likewise if a disseisor die seised, and a stranger abate, and the disseisee release to him, the heir of the disseisor shall enter, and detain the land for ever. 9.H.7. 24.

299. *Dormit aliquando jus, moritur nunquam*; Right may be troden down, but never troden out; for where it hath been said, that a release of right doth somewaies enure by way of extinguishment; it is so to be understood, either (as *Littleton* doth here) in respect of him that makes the release, or in respect that in construction of Law, it enureth not alone to him to whom it is made, but to others also, who be estranger to the release, which as hath been said, is a qualaity of an inheritance extinguished.

As when the heir of the disseisor is disseised, and the disseisor make a Lease for life, the remainder in fee, if the first disseisee release to the Tenant for life, this is said to enure by way of extinguishment, for that it shall enure to him in remainder, who is a stranger to the release, and yet in truth the right is not extinct, but doth follow the possession, viz. The Tenant for life hath it during his time, and he in remainder to him and his heirs, and the right of inheritance is in him in the remainder. 14 H.8. 6.b.

Sec. 479. and 480.

Here *Littleton* putteth a diversity between releases, which enure by way of extinguishment against all persons, and whereof

whereof all persons may take advantage ; and release which in respect of some persons enure by way of extinguishment , and of other persons by way of *mitter le droit*. Or between releases which indeed enure by extinguishment , for that he to whom the release is made , cannot have the thing released ; and releases which having some quality of such release , are said to enure by way of extinguishment ; but in troth do not , for that he to whom the release is made , may take the thing released. 11.H.7.25. 37.H.6.barr.39. 38.E.3.10.

And here *Littleton* putteth cases, where releases do absolutely enure by extinguishment ; as 1. Of the Lord and Tenant ; for the Tenant cannot have service to be taken of himself, nor one man can be both Lord and Tenant. 2. A man cannot have land , and a rent issuing out of the same land. 3. A man cannot have land, and a common of pasture issuing out of the same land. Fo.280.a.

The mesne being a feme enter-marry with the Tenant peravale, if the Lord release to the feme, the Seigniorie only is extinct, but if the release to the husband , both Seigniorie and mesnalty are extinct, " and in this case if the Lord release to " the husband and wife, it is a question how the release shall " enure ; but it is no question but that a release may be made " to a mesnalty, or a Seigniorie suspended in part of the estate. 19.H.6.19.

The Lord may release his Seigniorie to the tenant of the land for life or in tail, & sic de ceteris. But so cannot one release a right or an action, &c. 13.E.3. Extinguishment. Dr. 45. and voucher F.120. *It is not good for him if it is for a house*

Note, that by the release of all his right in the Seigniorie or the Land , the whole Seigniorie is extinct without any words of inheritance. 12.H.4. Release 21. 18. E. 2. *ibid*. 5.26. H.8.57. 41. Aff.6.

If there be Lord and Tenant by fealty and rent, the Lord granteth the Seigniorie for years , and the Tenant attorn , the Lord release his Seigniorie to the Tenant for years, and to the Tenant of the land generally , the whole Seigniorie is extinct , and the state of the lessee also. But if the release

T

had



had been to them and their heirs, then the lessee had had the inheritance of the one moiety, and the other moiety had been extinct, *Vide lib. 8c.*

*Readings had 5 good qualities But now they are rather like Riddle. The first is that they are apt and varnish to be smothered. Readings are like Sect. 481, 482. Capwings further from the nest. you think the nest is near.*

Here it appeareth by Littleton, That if a man make a lease for life, the remainder in fee and Tenant for life suffer a recovery by default, that he in remainder should not have a Formedon by the common Law: for Littleton saith, that he had not any remedy before the Statute. Neither is there any such Writ in that case in the Register, albeit in some books mention is made of such a writ, *W. 2. ca. 5. 34. E. 3. Formedon. 31. 11. E. 3. ibi. 31. 8. E. 3. 59. F. N. B. 117. b. 7. H. 7. 13.*

*Mes si celuy en le remainder uist entry sur le Tenant pur vie & luy disseisist, & apres tenant entry sur luy, & apres tenant pur terme de vie, per tiel recovery perde per default & mor. ore celuy en remainder bien poit aver breve de droit envers celuy que recouera, pur ceo que le mise Seignory joine solement sur le meer droit, &c.*

Here a disseisin gotten by wrong, and defeated by the entry of him, that right hath, is sufficient to maintain a writ of right against the recoverer in this case; for albeit the seisin is defeated, between the lessee for life, and him in the remainder, yet having regard to the recoveror, who is a meer stranger, and hath no title, it is sufficient against him. But otherwise it is, against the party himself, that defeateth the seisin, and the law is propense to give remedy to him that right hath. *7. E. 3. 62. 38. E. 3. 37. Fur. utr. 1.*

Lands are letten to A. for life, the remainder to B. for life, the remainder to the right heirs of the heirs of A. A. dieth, B. enters and dieth, a stranger intrudeth, the heir of A. shall have a writ of right of the seisin, which A. had as Tenant for life, *Fo. 281. a.*

If Lands be given in tail to A. the remainder to his right heirs, A. dyeth without issue, the Collaterall heir of A. shall have a writ of right of the seisin of A. *4. E. 3. 16. 17.*

And so note a diversity between a seisin to cause possess. fra-  
triv,

*tris, &c.* for there is required a more actual seisin, and a seisin to maintain a writ of right. 40.E.3.8. 42.E.3.20. 37.Aff. 4. (14.) E.4.24. 7.H.5.4. 11.H.4.11.

Sec. 483. 484.

Note a diversity, where the issue taken goeth to the point of the writ or action, there *modo* and *forma*, are but words of form; as in *Littletons* case of the writ of entry in *casu proviso*, and so is the (&c.) well explained in this Section.

But otherwise it is, when a collaterall point in pleading is traversed, as if a feoffment be alleaded by two, and this is traversed *modo* and *forma*, and it is found the feoffment of one, there *modo* and *forma* is materiall. So if a feoffment be pleaded by deed, and it is traversed *absque hoc quod feoffavit modo & forma* upon this collaterall issue, *modo & forma* are so essentiall, as the Jury cannot find a feoffment without deed. 9.H.6.1. 40.E.3.35. 21.E.3.4.22.F.N.B. 205.206.g. 40.E.3.5.32.H.8. issue *Br.80.12.E.4.4.*

Here is another diversity to be observed, that albeit the issue be upon a collaterall point, yet if by the finding of part of the issue, it shall appear to the Court, that no such action lieth for the plaintiffe, no more then if the whole had been found, there *modo & forma*, are but words of forme as here in the case which *Littleton* putteth of the Lord and Tenant appeareth. 10.E.4.7. 8.E.4.15. 20. and 21.E.4.3. *Mertlbr. cap.3.*

If the matter of the issue be found it is sufficient, and this rule holds in criminall causes. *Pl.Com. 101. v. 6.E.3.41. b. 9.H.7.3. 13.H.7.14. 8.E.3.70. 8. Aff. 29. & 39. 5.H.4. 22. 7.H.4.11. Pl.Com.92. 3.Mar.Dycr. 115.116. 40.E.3.35. 31.E.3.account 58.28. Aff.48.*

The lessee covenants with the lessor not to cut downe any trees, &c. and binds himself in a bond of 40.l. for performance of covenants; the lessee cuts down ten trees, the lessor brings an action of debt upon the bond, and assigneth a breach that the lessee cutteth down twenty trees, whereupon issue is joyned, and the Jury find that the lessee cut down ten,

judgment shall be given for the Plaintiff, for sufficient matter of the issue is found for the Plaintiff.

*Sec. 485. 486.*

An assault, battery, or taking of goods, &c. alledged in another county, cannot be traversed without speciall cause of justification, which extendeth to some certain place; as if a Constable of a Town in another county arrest the body of a man that breaketh the peace, there he may traverse the county (but he must not rest there) but all other places saving in the Town whereof he is Constable.

And so it is of taking of goods, the Defendant justifies for damage feisant in another county, he must as before traverse.

But where the cause of the justification is not restrained to a certain place, that is so locall as it cannot be alledged in any other Town, &c. then albeit the action be brought in a forraigne county, yet he must alledge his justification in the county where the action is brought.

*Forster*  
*3<sup>d</sup> Forster* In an action upon the case, the Plaintiff declared for speaking of slanderous words, which are transitory, and laid the words to be spoken in *London*, the Defendant pleaded a concord for speaking of words in all the counties of *England*, saving in *London*, and traversed the speaking of the words in *London*: the Plaintiff in his Declaration denied the concord, whereupon the Defendant demurres, and Judgment, &c. for the Plaintiff. *Tr. 30. El. Kings Bench. Inglebert and Jones, & Com. Pless. Pasche 38. El. Rot. 1656.*

It is an ancient Principle in Law, That for transitory causes of action, the Plaintiff might alledge the same in what place or County he would.

It is better that it be turned to a default, then the Law should be changed, or any innovation made, 2. H. 4. 18. 38. E. 3. 1.

A man did grant a rent, that the grantee should hold the distrefs against gages and pledges, and yet he shall gage delivery, for otherwise by this new invention all Replevins

vins shall be taken away, 4. E. 3. cap. 5. 4. H. 4. cap. 2.

Where the Jury is bound to find as well locall things in many cases, as transitory in other Counties, *Vide lib. 6. fol. 46. Dowdales Case*, 3. E. 3. Aff. 446. 14. H. 4. 35. 5. H. 5. 2. 37. H. 6. 2. 7. E. 4. 45. 18. E. 4. 1. 13. H. 7. 17. 2 Mar. Br. att. 104. 20. El. Dyer 171. 19. H. 6. 48. 28. H. 8. Dyer 29. 12. H. 8. 1.

Reg. by the Common Law, if the Defendant hath cause of justification or excuse, then can he not plead Not guilty, for then upon the evidence it shall be found against him, for that he confesseth the battery, and upon that issue cannot justifie it, but he must plead the speciall matter, and confesse and justifie the battery.

If in battery the Defendant may justifie the same to be done of the Plaintiffs own assault, he must plead it specially, and must not plead the generall issue; and so of the like.

In trespassse of breaking his close, upon Not guilty, he cannot give in evidence, that the beasts came through the Plaintiffs hedge, which he ought to keep, nor upon the generall issue justifie, by reason of a rent charge common, &c. 25. H. 8. Br.

In Detinue, the Defendant pleaded *non detinet*, he cannot give in evidence, that the goods were pawned to him for money, and that it is not paid, but must plead it, but he may give in evidence a gift from the Plaintiff, for that pro- veth he detaineth not the Plaintiffs goods, 22. H. 6. 33. 20. El. Dyer 276. 2. M. Dyer 212.

If two men be bound in a bond joynly, and the one is sued alone, he may plead matter in abatement of the Writ, but he cannot plead *Non est factum*, for it is his Deed, though it be not his sole deed, *lib. 5. fo. 119. Whelpdales case*, *vide* &c. fo. 283. 2.

Reg. whensoever a man doth any thing by force of a Warrant or Authority, he must plead it.

But all that hath been said must be under two cautions;  
1. That whensoever a man cannot have advantage of the speciall matter by way of pleading, there he shall take advantage

vantage of it in the evidence : For example, the Rule of Law is, That a man cannot justifie in the killing or death of a man, and therefore he shall be received to give the especial matter in evidence, as that it was *se defendendo*, &c.

2. That in any action upon the case, Trespasse, Battery, or of false imprisonment against any Justice of Peace, Mayor, or Bayliff of City, &c. in any his Majesties Courts in *Westminster* or elsewhere, concerning any thing by any of them done by reason of any of their Officers aforesaid, and aliother in their aid or assistance, or by their Commandement, &c. they may plead the generall issue, and give the speciall matter for their excuse or justification in evidence, 7.Jac.5. 23.H.8.c.5.

*Probationes debent esse evidentes (i.e.) perspicue & faciles intelligi.*

If the Trespasse were done the 4. of May, and the Plaintiff alleageth the same to be done the 5. of May, or the 1. of May, when no trespass was done, yet if upon the evidence it falleth out, that the trespass was done before the action brought, it sufficeth, 19.H.6.47. 5.E. 4. 5. 21. E. 4. 66. And *Littleton* saith, That the Jury may find the Defendant guilty at another day then the Plaintiff supposeth.

Note, That the Law of *England* respecteth the effect and substance of the matter, and not every nicety of form or circumstance. *Qui hæret in litera, hæret in Cortice, & apices juris non sunt jura.*

Sect. 487. Fo. 283. b.

205 Note a diversity, when the possession is first, and then a right cometh thereunto, the entry of him that hath right to the possession shall gain also the right, 50. E. 3. 78. *Vide S. 447.*

But when the right is first, and then the possession cometh to the right, albeit the possession be defeated (as here in *Littletons* case it is by the heir of the disseisor) yet the right of the disseisee remaineth. A, dyeth seised, and the Land descendeth to B. his Son, before he enter, an estranger abate  
and

and dieth seised, B. enter, against whom the heir of the A-  
 baror recovers in an Assize, B. may have a Writ of *Mortdan*,  
 and recover the land against him. And if the disseisin had  
 been done to A. &c. then after the recovery in the Assize,  
 B. should have had a Writ of entry in the *per*, because the heir  
 that is in by descent, is in the *per*.

*Seet. 490. & 491.*

*En præcipe quod red.* If the Tenant alien the land, hang-  
 ing the Writ, & puis le Demandant release a luy tout son  
 droit, &c. cel release est bonc, pur ceo que il est suppose terre  
 tenant per le suit del Demandant & uncore il nad riens en la  
 terre al temps de release fait. Item si en præcipe &c. le te-  
 nant vouch, & le vouchée entry en garr' si apres le demandant  
 release &c. al vouchée, co est assets bonc, pur ceo que apres le  
 vouchée avoit entry en le garr' il est tenant en ley al deman-  
 dant, &c.

But if after the vouchée hath entred into Warranty, and be-  
 come Tenant in Law, an Ancestor collaterall release to the  
 vouchée with Warranty, he shall not plead this against the  
 Demundant, for that the release by the estranger is void, 10.E.  
 4.13. 12.Aff.41. 7.E.3.6. 8.H.7.5. Dyer. 17.El.341. Sect.  
 447.

*Seet. 492. Fol. 285.a.*

*Nota*, there be two kinds of actions, viz. concerning  
 1. *Placita Coronæ*, or *Placita Criminalia*. 2. *Placita Com-*  
*munia*, seu *Civilia*. Of actions concerning Common Pleas,  
*quædam sunt ad rem, quædam in personam, & quædam mixtæ*,  
*Vide S.444. Actio nihil aliud est quàm jus prosequendi in*  
*judicio quod sibi debetur.* Or Action nest auter chose que  
 loial demand de son droit. And by the release of all actions,  
 causes of action be released, but within a submission of all a-  
 ctions to Arbitrement, causes of action are not contained,  
 lib.8.153. *Althams Case*, 35.H.8. Dyer 57. 5.Mar.217. 36.  
 H.6.8. vide 42.E.3. 22, 23.

Note a diversity: A man by his own cannot alter the na-  
 ture of his action; and therefore if the lessee for life or

years do waste, now is an action of Waste given to the lessor, wherein he shall recover two things, *viz.* the place wasted, and treble damages. But by act in Law the nature of the action may be changed; as if a man make a lease *pur terme daughter vie*, and the lessee doth waste, and then *Cesly que vie* dieth, an action of VVaste shall lie for damages only, because the other is determined by act in Law, 14.H.8. 14. 23. H.8. Br.Waste.

And again hereupon is another diversity to be observed, that in case when an action is well begun, and part of the action determined by act in Law, and yet the like action for the residue is given, there the VVrit shall not abate, but proceed. But where by the determination of part, the like action for the residue remaineth not, there the action well commenced shall abate, 9.E.4.50.

But if Tenant *pur auter vie* bring an Affize, and *Cesly que vie* dieth, hanging the VVrit, albeit the VVrit were well commenced, yet the VVrit shall abate, because no Affize can be maintained for damages only. Also an action of VVaste must be *ad exhibeditatem*, 2.H.4.22. 6.E.2. breve 807. vide &c.

If a VVrit of Annuity be brought, and the Annuity determineth, hanging the VVrit, the VVrit faileth for ever, because no like action can be maintained for the arrerages only, but for the annuity and arrerages, 34.H.6.10. 9.E.4.39. 14.H.7.31.

But where damages only are to be recovered, therealbeit by act in Law, the like action lieth not afterwards, yet the action well commenced shall proceed; as if a Conspiracy be brought against two, and one of them die hanging the VVrit, it shall proceed, 22.R.2. breve 888. 18.E.4.1. And in an Affize of No.Diss. a VVrit of Annuity, 24.Imp. and other mixt actions, a release of actions reals is a good plea, and so it is of a release of actions personalls, 2.H.4.13. 9.H.6.57.

But if three joyntenants be disseised, and they arraign an Affize, and one of them release to the disseisor all actions per-



personalls, this shall bar him, but it shall not bar the other Plaintiffs for having regard to them, realty shall be preferred, *et omne majus trahit ad se minus dignum.* 30. H. 6. Barre 59. 45. E. 3. fo. 6.

So it is in a Writ of Ward brought by two, &c.

*Nota diversit.* In reall actions where damages are not to be recovered by the Common Law, as in an Assize, &c. but are given by the Statute, there a release of all actions personalls is no bar, as in the Writ of Dower. *Entry sur disseisin in le per &c. Mordane. Aiel &c. Mert. cap. 1. Dower, Glouc. cap. 1.*

*Seff. 493, 494. fol. 258. b.*

A Release of actions personalls is a good bar in a *Qu. imp.* because it is a mixt action, 22. H. 6. 27. b.

A disseisor that hath nothing in the land, may plead a release of actions personalls, because damages are to be recovered against him, 11. *Ass. 9. 18. E. 3. 2. 23, 24.*

And the Tenant in an Assize shall plead a release of actions personalls to the disseisor, for that plea proveth that the Plaintiff hath no cause of action against him, 13. H. 4. 2. a.

If the disseisee release to the disseisor all actions realls, and the disseisor maketh a Feoffment in fee, and an Assize is brought against them, the Feoffee shall not plead the release to the disseisor, for that he is not privy to the Release, for a release of actions shall only extend to privies.

If the disseisee release all actions to the disseisor, and dye, this doth bar him but for his life. So note a diversity between a release of right, and a release of actions, 19. H. 6. 23. a.

*Seff. 496. Fol. 286. a.*

If the disseisee release all actions to the heir of the disseisor which is in by discent, he hath no remedy to recover the land; but yet the disseisee hath a right, for that he hath released his actions and not his right.

If the heir of the disseisor make a Feoffment in fee to two, and

and the disseisee release to one of the Feoffees all actions, the survivor shal not plead this Release.

306 Note, when a man hath severall remedies for one and the self-same thing, be it reall, personal or mixt, albeit he release one of his remedies, he may use the other, 19. Aff. 3. 30. E. 3. 19. 6. 21. H. 7. 23.

*Seet. 498. Fol. 286. b.*

If the Plaintiff in an action of Detinue of Charters which concern the inheritance of his land, can declare of one Charter in especiall; the Defendant shall not wage his Law, 41. E. 3. 2. 8. H. 6. 18. 28, 29. 10. H. 6. 20. 21. H. 6. 1. 14. H. 6. 4. 14. H. 4. 23, 24, 27.

An action of Detinue for Charters doth sound in the realty, for therein Summons and severance lieth; and in Detinue of goods a *Capias* doth lye, but for Charters in speciall a *Capias* lieth not, and yet a release of actions personalls in a Writ of Detinue of Charters, is a good barre, 20. H. 6. 45. 19. E. 3. Severance 14.

*Seet. 499. Fol. 287. a.*

In a Writ of Dower the Tenant pleaded that before the Writ purchased A. was seised of the Land, &c. untill by the Tenant himself he was disseised, and that hanging the Writ A. recovered against him, &c. Judgement of the Writ, and adjudged a good plea; in which plea, the Tenant confessed a disseisin in himself, 15. E. 4. 4. b.

*Seet. 500. Fol. 287. b.*

*Placitorum) criminalium alia majora, alia minora, alia maxima, secundum criminum quantitatem; sunt enim crimina majora & dicuntur capitalia eo, quod ultimum inducunt supplicium, &c. Minora verò quæ fustigationem inducunt, vel poenam pilloralem, vel tumboralem, vel carceris inclusivam &c. Bract. lib. 3. 101. b.*

*Criminalium quedam sententialiter mortem inducunt, quædam verò minime. Fleta. lib. 1. c. 15.*

12 Appellum significeth Accusatio; and the Appellant; Accusa-  
tor

tor is peculiarly in legall signification applied to Appeals of three sorts:

1. Of wrong to his Ancestor, whose heir male he is, and that is only of death, whereof our Author here speaketh.

The 2. is of wrong to the husband, and is by the wife only of the death of her husband to be prosecuted.

The 3. is of wrongs done to the Appellants themselves, as Robbery, Rape, and Mayheme. The word *Apellum* is derived of *Appeller*, to call, because *Appellans vocat reum in iudicium*. Glanv. l. 7. c. 9. *æstimatio capitis* (i.e.) so much as one paid for the killing of a man. *Fleta lib. 1. cap. 42. Hoved. fol. 344.*

You shall not read of any Insurrection or Rebellion before the Conquest, when the view of Frankpledge and other ancient Laws of this Realm were in their right use.

A release of all actions reall and personall cannot barr an Appeal of Death, because that release extendeth to common or civill actions, and not to actions criminall, 21. H. 6. 16.

*Roberia*, is a felonious taking away of goods *de la Robe*, that is, from the person, 22. Aff. 39. W. 1. c. 20.

*Sec. 502. Fol. 288. a.*

*En appeale de Mayhem un release de tous maners actions personalls est bone plea, &c.* for that every action wherein damages only are recovered by the Plaintiff, is in Law taken for an action personall, 21. H. 6. 16.

*Sec. 503. Fol. 288. b.*

Before that time that the Outlary appear of Record, the Defendant doth not forfeit his goods, nor the Plaintiff can be disabled, nor any Writ of Error doth lie in that case, 28. Aff. 49. 12. E. 3. *Village* 3. M. 4. & 5. *Eliz.* Dyer 222. S. 197.

If a man by process upon the Originall be Outlawed, there he shall be restored to nothing in the personalty against the Plaintiff. But whereby the Outlawry he forfeited all his goods and chattells to the King, he shall be restored to them;

them; also thereby he shall be restored to the Law, and to be of ability to sue &c. but if the Plaintiff in a personall action recover any debt &c. or damages, and the Defendant be Outlawed after Judgment, there in a Writ of Error brought by the Defendant upon the principall Judgment, a release of all actions personalls is a good plea. And so it is where a Judgment is given in a reall action, a release of all actions realls is a good bar in a Writ of Error thereupon.

And in this speciall case here put by *Littleton*, wherein the Plaintiff is to recover, or to be restored to nothing against the party; yet for that the Plaintiff in the former action is privy to the Record, a release of a Writ of Error to him is sufficient to bar the Plaintiff in the Writ of Error of the Suit, and vexation by the Writ of Error. And so note, that an action reall or personall doth imply a recovery of something in the realty, or personalty, or a restitution to the same; but a Writ implyeth neither of them, 1.H.4.6.13.E.4.1, 2. 26.H.8.3.b.29.Aff.35.47.E.3.6.35 H.6.19.

*See* 504. fol.289. a. & b.

A release of all actions reg. is no bar of execution, for the execution doth begin when the action doth end. And therefore the foundation of the first is an Originall Writ, and doth determin by the Judgment; and Writs of execution are called Judiciall, because they are grounded upon the Judgment, 13.H.4. Rel. 53.19.H.6.3. Where a *Capias ad Sat.* lieth at the Common Law, and where it is given by Statute, vide Sir *William Herberts* case, lib.3.fo.11,12.

Maximes in the Law concerning Executions. *Ea quæ in Curia nostra rite acta sunt, debita executioni demandari debent; parum est latam esse sententiam nisi mandetur executioni. Executio juris non habet injuriam. Executio est fructus & finis legis. Juris effectus in executione consistit. Prosecutio legis est gravis vexatio, executio legis coronat opus. Boni judicis est judicium sine dilatione mendere executioni. Favorabiliores sunt executiones aliis processibus quibuscunque.*

When *Littleton* wrote, by force of certain Acts of Parliament,

ment, execution might be had of lands (besides by force of the Elegit) upon Statute Merchant, Statute Staple, and Recognizances taken in some Court of Record, and since he wrote upon a Recognizance or Bond taken by force of the Statute 23. H. 8. before one of the Chief Justices, or the Mayor of the Staple, and Recorder of London out of Term, which hath the effect of a Statute Staple, 11. E. 1. Stat. de Aston Burnel, 13. E. 1. de Mercat. 27. E. 3. c. 22. 23. H. 8. cap. 6. 25. E. 3. 53. & vide 32. H. 8. c. 5. a profitable Statute, concerning executions of Lands, Tenements, &c. *Sed opus est interpretare. Vide fo. 289. & lib. 4. fo. 66. Fulwoods Case.*

If a man have a Judgement given against him for debt or damage, or be bound in a Recognizance, and dyeth, his heir within age, or having two daughters, and the one within age, no execution shall be sued of the Lands by Elegit during the minority, albeit the heir is not specially bound, but charged as Terre-tenant, 15. E. 3. Age 95. 24. E. 3. 28. 29. Aff. 37. 29. E. 3. 50. 47. Aff. 4. 47. E. 3. 7. lib 3. f. 13. Brook Age 33.

And so against an heir within age no execution shall be sued upon a Statute Merchant or Staple, nor upon the obligation or recognizance upon the Statute, 23. H. 8. for it is excepted in the proccesse against the heir. Neither if the heir within age endow his mother shall execution be sued against her during his minority, Temps E. 1. 402. 417. fo. 290. a.

Vide le statute 13. Eliz. cap. 5. made against fraudulent Feoffments, gifts, grants, &c. Judgements and Executions, as well of lands and tenements, as of goods and chattells, to delay, hinder or defraud Creditors, and others of their just and lawfull Actions, Suits, Debts, Damages, Penalties, Forfeitures, Heriots, Mortuaries and Releases. *Sed opus est, &c. Lib. 3. fo. 80. & c. Troyns Case, l. 5. f. 67. Gooches Case, l. 6. f. 18. Pakemans Case, l. 10. f. 56. the Chancellor of Oxfords Case. See the Statute of 3. H. 7. c. 4. & 50. E. 3. c. 6. M. 12. & 13. E. 12. Dyer 295. 18. Eliz. 451. Dyer.*

Elegit is a judicial Writ, and is given by the Statute, either upon a recovery for debt or damages, or upon a Recognizance

zance in any Court. The words of the writ be *Elegit sibi liberari, &c.* By this Writ the Sheriff shall deliver to the Plaintiff *Omnia catalla debitoris (exceptis bobus & asris Caruca) & medietatem terræ.* And this must be done by an Enquest to be taken by the Sheriff. *W.2.c.18. W.2.c.18.*

*Fieri fac.* is a Writ mentioned in the said Statute, but is a Writ of Execution at the Common Law, and is called a *Fieri fac.* because the words of the Writ directed to the Sheriff be, *quod fieri fac. de bonis & catallis, &c.*

But note, that a *Capias ad satisfac.* is not mentioned in the said Statute, because no *Capias ad satisfac.* did lie at the Common Law upon a Judgement for debt, &c. or damages, but only when the originall action was *Qu. vi & armis &c.* but later Statutes have given a *Capias ad satisfac.* where debt &c. or damages are recovered, *Lib.3.fo.11. Sir William Herberts Case.*

And note, that these three Writs of Execution ought to be sued out within the year and the day after Judgment; but if the Plaintiff sueth out any of them within the year, he may continue the same after the year, untill he hath execution.

And to none of these Writs of executions the Defendant can plead; but if he hath any matter since the Judgment to discharge him of execution (as a release of all executions &c.) he may have an *Audita querela*, and relieve himself that way.

*Sec̃. 505. Fol. 290. b.*

*Scire fac.* is a judiciall Writ, and properly lieth after the year and day after Judgment given. But because the Defendant may thereupon plead, this *Scire fac.* is accounted in Law to be in nature of an action, and therefore a release of all actions is a good bar of the same, and so is a release of executions, &c. *19.H.6.3.(4.) 18.E.4.7.*

This Writ was given in this case by the Statute of *W.2. c. 45.* for at the Common Law, if the Plaintiff had surceased to sue execution by *fieri fac.* or *levari fac.* a year and a day he

he had been driven to his new Originall, 8.E.3. 297, 298. 18.  
E.3.33. l.3. 12.

Note, that every Writ whereunto the Defendant may  
plead, be it Originall or Judiciall, is in Law an action.

Sect. 507. Fol. 291. a.

Note a diversity between a release of all actions, and a re-  
lease of all suits. If a man release all suits, all execution is  
gone, for no man can have execution without prayer and suit,  
but the King only. 26.H.6. Exec.4 l.8. f. 153. Ed. Althams  
case. Brook tit. Rel. 87.

So if the body of a man be taken in execution, and the  
Plaintiff release all actions, yet shall he remain in execution,  
but if he release all debts or duties it is otherwise, 26. H.6.  
Exec.7.

If A. be accountable to B. and B. release him all his duties,  
this is no bar in an action of account, for what shall fall out  
upon the account is incertain, but duties do extend to all  
things due that is certain, and therefore dischargeth Judgments  
in personall actions and executions also, 20. H.6. per Paston.

Sect. 508, 509, 510, 511. Fol. 291. b. 292. a.

There be two kinds of Demands or Claims. Pl. Com. Stiles Case, 359, &c.

1. Express or in deed, as in all reall actions.
2. Implied or in Law; as 1. In all actions personall. 2. In actions of Appeals. 3. Of execution. 4. Of Title or right of Entry either by force of a condition, or by any former Right. 5. Of a rent service, rent charge, common of pasture &c. *verre fol.*

All which Littleton here and in the two next Sections fol-  
lowing, putterh but for example, for by the release of all  
Demands, other things also be released, as rents seck, all  
mixt actions, a Warranty which is a Covenant reall, and all  
other Covenants reall and personall, Estovers, all manner of  
Commons, and profit appender, Conditions before they be  
broken



broken or performed, or after, Annuities, Recognizance, Statute merchant, or of the Staple, obligations, contracts, &c. are release and discharged, 38. H.8. tit. Release, Br.9.5. H.7. 7.15.20. Aff.p. 5. 40. E.3.22. 49. E.3.7.b.50. Aff.p.6.13. R.2. Avow.89. Althams case ante lit. Sec.748. Dy.5. Eliz.2.17.

*Quarela à quarendo*, this properly concerneth personal actions of mixt at the highest, for the plaintiffe in them is called *quarens*. And yet by a release of all *quarrells*, all actions reall and personall are released; likewise all *causes* of action are released thereby, albeit no action be then depending for the same. 39. H.6.9.

Sec.512.513. Fo.292.b.

A sum of money to be paid at a day to come, is *debitum in presenti, quamvis sit solvendum in futuro*. 11. H.4.41.43.

An *Executor* before probate, may release an action, and yet before probate he can have no action, because the right of the action is in him. T.2. Fa. in C.B. inter Middleton & Rinnot. 18. H.6.23.b. Pl. Com.277, 278. Greysbrokes case per Weston.

If a man make a lease of land to another for yeares, rendering to him at Mich 40. shillings, and after before the day of payment, he release to the lessee all actions, this is a void release. 7. H.7. 5.a.

But the lessor before the day may acquire or release the rent. But if a man be bound in a bond, or by contract to another to pay one 100. pound, &c. at five severall dayes, he shall not have an action of debt before the last day be past, and so note a diversity between duties which touch the realty, and meer personalty. But if a man be bound in a Recognizance to pay 100. pound, &c. presently after the first day of payment he shall have execution upon the Recognizance for that sum, &c. for that is in the nature of severall judgments; and so it is of a covenant or promise, &c. and so note the diversities. 45. E.3.8. 13. H.4. Avow.240.30. E.3.13. 10. E.2. Execution.137. F.N.B.267.9. E.3.7.5. Mar. action sur le case. Br.108.3. Mar. Dy.113. lib.4. fo.94. Slades case. lib.4. fo.81.b. Fords case.

If a man hath an annuity for terme of years, or for life, or in fee, and he before it be behind doth release all actions, this shall not release the annuity, for it is not meerly in action because it may be granted over. 39 H. 6. 28. b. 5 E. 4. 45. 2 H. 4. 13. 12 R. 2. release 29.

Sec. 514. Fo. 293. &c.

Mise, so called because both parties have put themselves upon the meer right to be tried by grand Ass. or by Battaile, so as that which in all other actions is called an issue, in a writ of right in that case is called a Mise. But in a writ of right, if a collaterall point is to be tried, there it is called an issue, 33 H. 8. c. 13. 3. Ed. 6. ca. 36.

And seeing the Mise is joyned upon the meer right, albeit the verdict of the grand Ass. be given upon another point, yet judgement finall shall be given; and so it is if the Tenant after the Mise joyned make default, or confesse the action, or if the demandant be non-suit, &c. 34 E. 3. Judgement 250. 13. H. 4 Judgement. 245. M. Dy. 98. li. 5. fo. 85. Peneius Case, F. N. B. 5. 11. 13.

If the petty Jury be attainted of a false Oath, &c. The judgement of the common Law is,

1. *Quod amittat liberam legem imperpetuum. i. e.* he shall never be received to be a witnesse, or of any Jury.
2. *Quod foris faciat omnia bona & Catalla sua.*
3. *Quod terra & tenementa in manus domini Reg. capiantur.*
4. *Quod uxores & liberi extra domus suas ejicerentur.*
5. *Quod domus sua prostreantur.*
6. *Quod arbores sua extirpentur.* 7. *quod prata sua areantur.* & 8. *quod corpora sua carceri mancipentur.* So odious in this case, and the severity of this punishment is to this end, *ut pena ad paucos, metus ad omnes perveniat*, for there is *miser cordia puniens*, and there's *crudelitas parcens*.

In no case where a contempt, trespassse, deceit, or injury is supposed in the defendant he shall wage his Law, because the Law will not trust him with an Oath to discharge himself in those cases, only in some cases, in debt, detinue, accompt, the

defendant is allowed by law, to wage his Law. 44 E. 3. 32.  
18 E. 3. 4. 24 E. 3. 39.

- 177 In an action of account against a Receiver upon a receipt of money, by the hand of another, &c. the defendant shall not wage his Law, because the receipt is the ground of the action which lyeth not in privity between the plaintiffe and defendant, but in the notice of a third person, and such a receipt is traverfable. 15 E. 4. 16. 10 E. 4. 5. But in an action of debt upon a arbitrement, or in an action of detinue by the bailement of another hand, the defendant shall wage his Law, because the debt and detinet is the ground of those actions, and the contract of bailement, though it be by another hand, is but the conveyance, and not traverfable. In an action of account against the Bayliffe of a Manor, the defendant cannot wage his Law, because it soundeth in the re-  
alty. 33 H. 6. 24. 13 H. 7. 3. 4. 1 H. 6. 1. b. 11 H. 4. 5. 4. 5. H. 5. 13.  
9 E. 4. 1. 34. H. 8. ley geger Br. 97.

In an action of debt brought by an Attorney for his fees, the defendant shall not wage his Law, because he is compellable to be his Attorney. 21 H. 6. 4. 10 H. 6. 7. 28. H. 6. 4. 38  
H. 6. 6.

Whensoever a man is charged as Executor or Administrator, he shall not wage his Law, for no man shall wage his Law of another mans deede but in case of a successor of an Abbot, for that the house never dyeth. 5 H. 6. 38. 1 H. 7. 25.

## C H A P. IX.

## Of Confirmation.

Sect. 515.

**C**onfirmatio omnes supplet defectus, licet id quod actum est ab initio, non valuit. *Brac. li. 2. 58.*

A confirmation is a conveyance of an estate or right in *esse*, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased.

Confirmatio est nulla ubi donum præcedens est invalidum, & ubi donatio nulla omnino nec valebit confirmatio. *Brac. li. 2. fo. 27, 28.*

Non valet confirmatio nisi ille qui confirmat, sit in possessione rei, vel juris unde fieri debet confir. & eodem modo nisi ille cui confir. fit, sit in possessione. 10 E. 2. confir. 14. 32. E. 3. 9. *Pl. Com. Count de Leicesters case.*

Quælibet confirmatio, aut est perficiens, crescens, aut diminuens. *lib. 9. fol. 142. Beaumonds case.*

Carta autem de confirmatione est illa quæ alterius factum consolidat & confirmat, & nihil novi attribuit, quandoque tamen confirmat & addit. *Flet. l. 3. ca. 14.*

Enasc' case un fait de confirmation est bon & available, lou en tiel case un fait de release nes pas bon, &c. Car release n'est pas available, mes lou est un privy, &c.

And note that where a confirmation shall enlarge an estate, there privy is required, as well as in the case of the Release. 9 H. 6. 22. Release 44. *Littleton* in this Chapter putteth eight diversities betweene a confirmation and release. And in this Chapter is also to be observed eight cases, wherein a release and confirmation have the like operation in Law. *Vid. Sect. 516. &c. fo. 296. a.*

If the disseisor make a Lease for years, to begin at *Michaelmas*; and the disseisee confirme his estate, this is void because

because hee hath but *interesse termini*, and no estate in him, whereupon a confirmation may enure. 4 H. 7. 10. by read. 22 E. 4. 39.

Sect. 519. &c. Fo. 296.b.

*Si le desſeisee confirme leſtate le diſſeiſor a aver & tenant a luy pur terme de ſa vie enc' le diſſeiſor ad fee ſimple, &c. pur ceo que quant ſon eſtate ſuit confime, donque il avoit fee, & tiel fait ne poit charge, ſon eſtate ſans enter fait ſur luy, &c. alia ratio, quia confirmare, idem eſt quod firmum facere. 19 H. 6. 22. 6 E. 3. confirmation. 4.*

Sect. 520. Fo. 297. a.

331. Nota, a diverſity betweene a bare aſſent without any right or intereſt, and an aſſent coupled with a right or intereſt, and therefore an attonement cannot be made for a time, nor upon condition, but if the perſon make a Leaſe for a 100 yeares, the Patron and ordinary may confirme 50 of the yeares, for they have an intereſt, and may charge in time of vacation. Lib. 5. to. 81. *Fordes caſe.*

If tenant for life make a leaſe for a 100 yeares, the leſſor may confirme either for part of the terme, or for part of the land. But an eſtate of freehold, cannot be confirmed for part of the eſtate, for that the eſtate is intire, and not ſeverall as yeares be.

Sect. 521. Fo. 207. b.

If the diſſeiſor make a gift in taile the remainder for life, the remainder to the right heires or tenant in taile, this extendeth only to the eſtate taile, &c. If the diſſeiſor infeoffe A and B and the heires of B if the diſſeiſee confirme the eſtate of B for his life, this ſhall not onely extend to his companion, but to his whole fee ſimple, becauſe to many purpoſes, he had the whole fee ſimple in him, and the confirmation ſhall be taken moſt ſtrong againſt him that made it.

If a feme diſſeiſereſſe make a feoffment in fee to the uſe of A for life, and after to the uſe of her ſelfe in taile, and the remainder to the uſe of B in fee, and then taketh husband the

the disseisee, and he release to A. all his right, this shall enure to B. and to his own wife also, for by the rule of *Littleton*, it must enure to all in the remainder.

But A. let's Land to B. for life, and B. maketh a Lease to C. for his life, the remainder to A. in fee, if A. release to C. all his right, this is good to perfect the estate of C. for his life.

But when C. dyeth, A. shall be in of his old estate, &c. and note that in these two cases, the fee is devested, and vested all at one instant, &c. *Vide fo. 297. b.*

*Pur ceo que le remainder est dependant, &c.* by this some have gathered, that if a disseisor make a Lease for life, reserving the reversion to himselfe, and the disseisee, confirme the estate of the disseisor, that he may enter upon the lessee, because the estate of him in the reversion dependeth not upon the estate for life as the remainder: but all is one, for by the confirmation made to him in the reversion, all the right of him that confirmeth is gone, as well as when he maketh it to him in remainder: and he cannot by his entry avoid the estate of the lessee for life, but he must avoid the estate of the lessor, which against his own confirmation he cannot doe; and it hath been adjudged, that if a disseisor make a Lease for life, and after levy a fine of the reversion with proclamations, and the five years passe, so as the disseisee is for the reversion barred, he shall not enter upon the Lessee for life. Reported by Sir *Jo. Popham* chief Justice.

Where the particular estate and the remainder depend upon one title, there the defeating of the particular estate is a defeating of the remainder. But where the particular estate is defeasible, and the remainder by good title, there though the particular estate be defeated, the remainder is good. As if the lessor disseise A. lessee for life, and make a Lease to B. for the life of A. the remainder to C. in fee, albe it A. reenter, and defeat the estate for life, yet the remainder to C. being once vested by good title, shall not be avoided, for it were against reason, that the lessor should have the remainder againe against his own livery. So it is, if

a lease be made to an Infant for life, the remainder in fee, the Infant at his full age disagree to the estate for life, yet the remainder is good, *Pl. Com. Colthirffs Case, fo. 298.a.*

If a lease be made to A. for the life of B. the remainder to C. in fee, A. dyeth before an Occupant enter, here is a remainder without a particular estate, and yet the remainder continueth, 17 E. 3. 48.

A rent is granted to the Tenant of the land for life, the remainder in fee, this is a good remainder, albeit the particular estate continued not, for *co instante*, that he tooke the particular estate, *eo instante*, the remainder vested, and the suspension in Judgement of Law grew after the taking of the particular estate, 3 E. 3. *Abb. Ass.*

If a man grant a rent to B. for the life of *Alice*, the remainder to the heirs of the body of *Alice*,<sup>3</sup> this is a good remainder; and yet it must vest upon an instant, 7. H. 4. 6.

*Sec. 522, 523, 524. Fol. 298.2.*

A Release is more forcible in Law, then a Confirmation, if the disseisee and a stranger disseise the heir of the disseisor, and the disseisee confirm the estate of his companion, this shall not extinguish his right that was suspended: So as if the heir of the disseisor re-enter, the right of the disseisee is revived.

And so it is if the grantee of a rent charge, and a stranger disseise the Tenant of the Land, and the grantee confirm the estate of his companion, the Tenant of the land re-enter, the rent is received, for the Confirmation extendeth not to the rent suspended, otherwise it is of a release in both cases.

*Est bone & sure chose en chesc' confirmation d'aver ceux parolls a aver & tener les tenements, &c. en fee, ou en fee tail, ou pur terme de vie, ou pur terme dans solonque ce que le case est, &c.*

Note the diversity between a Confirmation of the estate for life in the land, to have and to hold the said state in the land to him and his heirs, this cannot enlarge his estate, for his



his estate being but for life, cannot be extended to his heirs. But in that case if he confirme the state for life in the land, in the premises of the Deed, and the *habendum* is, to have and to hold the land to him and his heirs, this shall create in him a fee simple, 18 E. 3. 40.

Sect. 525.

If a man letteth land to the husband and wife, to have and to hold, the one moiety to the husband for terme of his life, and the other moiety to the wife for her life, and the lessor confirm the estate of them both in the land, to have and to hold to them and to their heirs; by this Confirmation, as to the moiety of the husband, it enureth only to the husband and his heirs, for the wife had nothing in that moiety, but as to the moiety of the wife they are joyntenants, for the husband hath such an estate in his wives moiety in her right, as is capable of a Confirmation. But if such a lease for life be made to two men by several moieties, and the lessor confirm their estates in the land to have and to hold to them and to their heirs, they are Tenants in Common of the Inheritance; for reg. the Confirmation shall enure according to the quality and nature of the estate which it doth enlarge and encrease, 18 Aff. p. 3. 18 E. 3. Confirmation 17. fol. 299. b.

If a lease for life be made to A. the remainder to B. for life, and the lessor confirm, &c. A. taketh one moiety to him and his heirs, and therefore of the one moiety he is seised for life, the remainder to B. for life, and then to him and his heirs: of the other moiety A. is seised for life, the immediate inheritance to B. and his heirs, because as to the moiety which B. takes the same is executed, 39 H. 6. 9

If lands be given to two men, and to the heirs of their two bodies begotten, and the Donor confirm their two estates in the land, to have and to hold the land to them two and to their heirs; in this case some are of opinion, that they shall be joyntenants of the fee simple, because the Donees were jointenants for life, and the Confirmation must enure

according to the estate which they have in possession, and that was joynt. But others hold the contrary: For

1. They say, that the Donees have to some purposes severall inheritances executed, though between the Donees survivor shall hold for their lives.

2. They say, that when the whole estate which comprehended severall inheritances is confirmed, the Confirmation must enure according to the severall inheritances, which is the greater and most perdurable estate, and therefore that the Donees shall be Tenants in Common of the inheritance in this case.

Albeit in this case of *Littleton*, the husband by the Confirmation gaineth an estate for life in remainder, yet if the husband doth waste, an action of Waste shall lie against him and his wife, notwithstanding the mean remainder, because the husband himself committeth the waste and doth the wrong, 17 E. 3. 68. b. Sir *Edward Caries Case*, lib. 5. fol. 76. b.

*Scot. 526, 527. Fol. 300. a.*

Note a diversity between a lease for life and a lease for years, made to a feme covert: for her estate of Freehold cannot be altered by the confirmation made to her husband and her, as the term for years may, whereof her husband may make disposition at his pleasure. <sup>for it may be dissolved by a confirmation for life</sup>

387 Chattels reals, as leases for years, Wardships, &c. are not given to the husband absolutely (as all Chattels personals are) by the intermarriage, but conditionally, if the husband happen to survive her, and he hath power to alien them at his pleasure: but in the mean time the husband is possessed of the Chattels reall in her right, 5 E. 3. 17. b. *Pl. Com.* 418. b. 24. H. 4. 12. *Pl. Com.* Dame *Hales Case*, 50 Aff. p. 15. 4 H. 6. 5. 7 H. 6. 1. 21 H. 7. 29. 21 E. 4. 40. 16 H. 8. 7.

Such a thing as I may defeat by my Entry, I may make good by my Confirmation, 11 H. 7. 28. 3 H. 4. 10.

If the feoffee upon condition grant a rent charge *en fee*, and the feoffor confirm it, and after the Condition is broken

ken, and the feoffor enter, he shall not avoid the rent charge. And so it is if the heir of the disseisor grant a rent charge, and the disseisee confirmeth it, and after recover the Land, he shall not avoid the rent. And yet in neither of these cases his entry was congeable at the time of the Confirmation, *Lib. 1. fo: 147. &c. Aime Mayowe's case.*

Seff. 528. Fol. 300. b.

*Persona*, is said to be seised in *jure Ecclesiæ*, and the Law had an excellent end herein, *viz.* that in his person the Church might sue for and defend her right, and also be sued by any that had an elder and better right; and when the Church is full, it is said to be *plena & consulta* of such a one person thereof, that may *vicem seu personam gerere ejusdem Ecclesiæ*, Brit. fol. 234. b. F. N. 48.

A. Parson of D. is Patron of the Church of S. as belonging to his Church, and presents B. who by consent of A. and of the Ordinary, grant a rent charge out of the Gleab; this is not good to make the rent charge perpetuall, without the assent of the Patron of A. no more then the assent of the Bishop who is Patron, without the Dean or Chapter; or no more then the assent of the Patron being Tenant in Tail or for life, as *Littleton* saith. And *Littleton* here saith, that the Patron that confirms must have a fee simple, meaning to make the charge perpetuall. And *Littleton* after saith, that in the case of the Parson the fee is in *abeiance*; and seeing the consent of the Patron is in respect of his interest as heir, it appeareth by *Littleton* he may consent upon Condition, <sup>326</sup> otherwise it is of an attornment, because it is a bare assent. Also if the state of the Patron be conditionall, and he confirmeth, and after the Condition is broken, his Confirmation is void, *Lib. 2. 39 & 24 l. 1. 153 l. 4 23, 24. l. 5. 31. 81. l. 10. 6. l. 11. 19. l. 6. 34.*

Note a diversity between a sole Corporation, as Parson, <sup>358</sup> Prebend, Vicar, &c. that have not the absolute fee in them, for to their grants, the Patron must give his consent. But if there be a Corporation aggregate of many, as Dean and Chapter

Chapter, Mr. fellowes and Schollars of a Colledge, Abbot or prior, and Covent, &c. or any sole corporation that hath the absolute fee, as a Bishop with consent of the Deane and Chapter, they may by the Common Law make any grant of, or out of their possessions, without their founder or patron, albeit the Abbot or prior, &c. were presentable: and so it is of a Bishop, because the whole estate and right of the Land was in them, and they may respectively maintaine a writ of right. 12 H. 4. 11. 19 E. 3. 7. 7. *Eliz. Dy.* 23 8. 9. E. 4. 6. 2 H. 4. 11.

And note a diversity betweene a confirmation of an estate, & a confirmation of a deed, for if the disseisor make a charter feoffment to A. with a Letter of Attorney, and before livery, the disseisee confirm the estate of A. or the Deed made to A. this is cleerly void, though livery be made after. But if a Bishop had made a Charter, &c. and the Deane and Chapter, before livery confirm the Deed, this is a good confirmation, and livery made afterwards is good. The like Law is of confirmation of a Deed; of grant, of a reversion before Attornement.

Grants made by Parsons, Prebends, Deane and Chapter, &c. are restrained by divers acts of Parliament, 13. *El. ca.* 10. 1. *Eliz. ca.* 18, 18. *El. ca.* 11. 1. *Ja. ca.* 3. *Section* 593 and 648. 1. 2. fo. 46. 1. 4. 76. 120. 1. 5. 9. 6. 14. li. 6. 17. li. 7. 8. lib. 11. 6. 7. *desesfus sum*, &c.

*Sec.* 529. and *Sec.* 531. *Fol.* 301. a, & b.

Note a diversity, where the determination of the rent is expressed in the Deed, and when it is implied in Law. For when Tenant for life grant a rent in fee, this by Law is determined by his death, and yet a confirmation of the grant by him in reversion, makes that grant good for ever, without words of enlargement, or clause of distress, which would amount to a new grant; and yet if the Tenant for life had granted a rent to another and his heirs by expresse words, during the life of the grantor, and the lessor had confirmed that grant, it should determine by the death of

Tenant for life 26. *Ass.* p. 38. 45. *Ass.* p. 13. 14. *Ass.* p. 14.

*Dedi* or *concessi*, may amount to a grant, a feoffment, a gift, a Lease, a release, a confirmation, a surrender, &c. and it is in the Election of the party, to use which of these purposes he will, *Brit. li. 2. f. 59. b. Brook tit. confir. 20. 14 H. 7. 2 37. H. 6. 17. Dy. 8. Eliq. 4 H. 7. 10. 22 E. 4. 36. 40 E. 341.*

But a release, confirmation, or surrender, &c. cannot amount to a grant, &c. nor a surrender, to a confirmation, or to a release, &c. because these be proper and peculiar manner of conveyances, &c.

*Dimisi* (and this verbe, *volo*) will amount to a confirmation. 7 E. 3. 9. In ancient statutes, and in originall writs, as in the writ of entry *in casu proviso, in consimili casu ad com. legem.* &c. this word *dimisi* is not applyed onely in a Lease for life, but to a gift in taile, and to a state in fee. 32 E. 3. *breve 29. 1. Stat. Glouc. ca. 4. Benigne enim faciendæ sunt interpretaciones cartarum, propter simplicitatem laicorum, ut res magis valeat quam pereat;* and he to whom such a Deed comprehending, *dedi*, &c. is made, may plead it as a grant, as a release, or as a confirmation, at his Election, 14 H. 4. 36. li. 5. fo. 15. in *Newcomens* case.

If a disseisor make a Lease for life, or a gift in taile, the remainder to the disseisee in fee, the disseisee by this Deed granteth over the remainder, the particuler tenant attorneth the disseisee shall not enter upon the Tenant for life, or in taile, for then he should avoid his grant demesne, which amounted to a grant of the estate, and a confirmation also.

*Señ. 543. Fol. 302. b.*

If *cestuy que use* and his feoffees after the Statute 1 R. 3. and before the Statute 27 H. 18 ca. 10. had joyned in a feoffment, it shall be the feoffment of the feoffees, because the State of the Land was in him. 21 H. 7. 34. b. *Pl. Com. 59. a. Wimbyshes* case:

So it is if the Tenant for life, and he in the remainder, or reversion in fee joyne in a feoffment by Deed, the livery of the freehold shall move from the lessee, and the inheritance from

from him in the reversion or remainder, from each of them according to his estate. *Pl. Com.* 140. *Brownings* case. 2 H. 5. 7. 13 H. 7. 14. 13 E. 4. 4. a. 27 H. 8. 13. *M.* 16. and 17 *El.* 339.

But if he in the reversion in fee and Tenant for life, joyn in a feoffment *per paroll*, this shall be (as some hold) first a surrender of the estate of Tenant for life, and then the Feoffment of him in the reversion, for otherwise if the whole should passe from the lessee, then he in the reversion might enter for the forfeiture, and every mans act (*ut res magis valeat*) shall be construed most strongly against himself.

If the disseisor and disseisee joyn in a Charter of feoffment, and enter into the Land, and make livery, it shall be accounted the feoffment of the disseisee, and the confirmation of the disseisor.

*Placitum à placendo, quia omnibus placet. Fo.* 303. a.

*Ordine placitandi servato, servatur & jus, &c.* 1. In good order of pleading, a man must plead to the jurisdiction of the Court. 2. To the person of the plaintiffe, and to the defendant. 3. To the Count. 4. To the Writ. 5. To the action, &c. *Bract. li.* 5. *fo.* 400. *Britton fo.* 41. a. and 122. 40. E. 3. 9. b.

The count must be agreable and conform to the writ, the barre to the count, &c. and the judgement to the count.

*Certa debet esse intentio & narratio, & certum fundamentum et certa res quæ deducitur in judicium.* Note, three kind of certainties. 1. To a Common intent, and that is sufficient in a barre, which is to defend the party, and to excuse him.

2. A certaine intent in generall, as in Counts, replications, and other pleadings of the plaintiffe, that is to convince the defendant; and so in indictments, &c.

3. A certaine intent in every particular, as in Estoppells. *Bract. l.* 2. *fo.* 140. *lib.* 5. 120, &c. *Lobs* case.

Where a matter of Record is the foundation, or ground of the suit of the plaintiffe, or of the substance of the plea, there it ought to be certainly, and truly alleadged, otherwise it is, where it is but a conveyance, *Pl. Com.* 65. a 6. 100. 376. and 410. 8. *Aß.* 29. 5 E. 4. 70 E. 4. 1. *Ambiguum placitum interpre-*

*vari debet contra proferentem.* 3 H.7.3.29 Aß.10. 14 H.4.4.b. lib.3.fo.59. *Lincolne case.* Vide, &c. fo 303.b. *Expedit Reipublicæ ut fit finis litium,* 22 E.4.40.

All necessary circumstances implied by Law, in the plea need not to be expressed, as in the plea of a feoffment of a Mannor, livery and attornment are implied. 40 E.3.40.43. 46. 14 H.4.15. 12 E.4.1. 7 H.7.3.

A man is bound to performe all the Covenants in an Indenture: if all the Covenants be in the affirmative, he may generally plead performance of all, but if any in the negative, to so many he must plead specially (for a negative cannot be performed) and to the rest generally. 2 H.7.15. 4 H.7.12. 26 H.8.5.b.

So if any be in the disjunctive, he must shew which of them hath performed. So if any are to be done of Record, he must shew that specially, and cannot involve that in generall pleading. l.8.133. *Turners case,* and 120. *Benhams case.* l.9.25.61. lib.10.100.

The Count or declaration is an exposition of the Writ, and addeth time, place, and other necessary circumstances, that the same may be triable, and any imperfection in the Count doth abate the Writ. *Vide bone* matter concernant pleading. Fo.303.

A departure in pleading, is said to be when the second plea containeth matter not pursuant to his former, and which sortifieth not the same. As if in Ass. the Tenant plead a discent from his Father, and giveth a colour, the demandant intituleth himselfe by a feoffment from the Tenant himselfe, ~~the plaintiffe~~ cannot say, that the feoffment was upon condition, and to shew the condition broken, for that should be a cleare departure from his barre, because it containeth matter <sup>which doth not follow by the barre</sup> subsequent, but in an Ass. if the Tenant plead in barre, that I.S. was seised and infeoffed him, &c. and the plaintiffe sheweth, that he himselfe was seised in fee, untill I.S. disseised, who infeoffed the Tenant, and he re-entred, the defendant may plead a release of the plaintiffe to I.S. for this doth fortifie the barre. *Pt. Com.* 105. 1 Mar.Dy.95.28.H.8.fo.31.6.H.7.8. 3 H.6. *departure* 2.

Where



Where the Tenant or defendant may plead a generall issue, there upon the generall issue pleaded, he may give in evidence as many distinct matters, to barre the action or right of the demandant, or plantiffe as he can.

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A speciall verdict may continue double or treble matter, and therefore in those cases, the Tenant or defendant may either make choice of one matter, and so plead it to barre, the demandant or plantiffe, or to plead the generall issue, and to take advantage of all, or he may plead to part, one of the Pleas in barre, and to another part, another plea, and his conclusion of his plea, shall avoid doublenes, and hereby neither the Court, nor the Jury is so much inveigled, as if one plea should contain divers distinct matters. And if the Tenant make choice of one plea in barre, and that be found against him, yet he may resort to an action of an higher nature, and take advantage of any other matter. And the law in this point, is by them that understand not the reason thereof misliked, saying, *nemo prohibetur pluribus defensionibus uti*, 17 E. 3. 73. 39 H. 6. 27. *Apices juris, non sunt jura*; and yet in law, *præstat cautela quam medela*.

Sect. 535, 536, 537, 538. Fo. 305. a. b.

A Tenure may be abridged by a confirmation: but not a rent charge, or common. But a man may release part of his rent charge, or common, &c.

The Lord by his confirmation may diminish and abridge the services, but to reserve upon the confirmatiō new services he cannot, so long as the former state in the Tenancy continueth; and as where confirmation doth enlarge an estate in Land, there ought to be privity, so reg. where a confirmation doth abridge services, there ought to be privity. 28 E. 3. 92, 93. 26. Aff. 37. 6. El. Dy. 230 b. 7 E. 4. 25. a. 21 E. 4. 62. per Brian. 10 E. 3. avowry 100.

Also there is required privity, when the Lord by his release, abridgeth the services of his Tenant. And therefore the Lord paramount cannot release to the Tenant paravaile saving to him part of his services, but the saving in that case

is void, 4 E. 3. 19. 9. E. 3. 1. 12 E. 4. 11. 16. E. 3. *Fines* 4.

If a man hold of me by Knights service, rent, suit, &c. and I release to him all my right in the Seigniorie, excepting the Tenure by Knights service, or confirm his estate to hold of me by Knights service onely, for all maner of Services, Exactions and Demands, yet shall the Lord have Ward, Marriage, Relief, Ayd, *pur file marier, & pur faire fits Chivaler*, for these be incidents to the Tenure that remain. But it is holden, That if a man make a gift in Tail by Deed, reserving 2 s. rent, *aluy & ses heires pro omnibus & omnimodis servitiis, exactionibus secularibus & cunctis demandis*, If the Donee dye, his heire of full age, the Donor shall have no reliefe; because relief lieth in demand, 13 R. 2. *Avowry* 29. *Mota Fitzh. Confirmation. Pl.* 21.

*Sect. 541. Fol. 306. b.*

A man may be put out of possession of the custody of his Ward, but not of his Villain in gross, 45 E. 3. 10. 1 H. 6. c. 5. *Reg.* 102.

Also of things that are in grant, as Rents, Commons, &c. 356 it is at the election of the party, whether he will be desseised of them or no, *Brook tit. Property*, 28.

*Non valet confirmatio nisi ille qui confirmat sit in possessione rei vel juris, unde fieri debet confirmatio, & eodem modo nisi ille cui confirmatio fit, sit in possessione*, *Bract.* 1. 2. 99. b. 9 E. 4. 38. *Dyer* 10 El. *Growches Case*.

But of a Villain Regardant to a Manor, the Lord may be put out of possession, for by putting him out of possession of the Manor, which is the principal, he may likewise be put out of possession of the Villain Regardant, which is but accessory: and by the recovery of the Manor, the Villain is recovered.

But if another doth take away my Villain in gross or Regardant, he gaineth no possession of him. *for Nature habet de iure quod agere non potest in re aliena*

By the grant of the Manor without saying *Cum pertinentiis*, the Villain Regardant, Advowson appendant, and the like, do passe: for if the desseisor shall gain them as incidents to the Manor

Manor whose estate is wrongful, *A multo fortiori*, the feoffee who commeth to his estate by lawful Conveyance, shall have them as incidents. But where the entry of the disseisee is lawful, hee may seise the Villain Regardant, or present to the Advowson, &c. before he enter into the Manor, otherwise it is where his entry is not lawful, 9 E.4.38. 3 H.4. 15.18 E. 3.44. 19 R.2. *Tresp.* 255. 10 H.7.9. *F.N.B.* 33.9. 22 H.6.33. per Moyle 43. E. 3. 12. *Bract.* 242, &c. *Brit. fol.* 126.

*Sec.* 545, 546, 547, 548, 549, &c. *Fol.* 308.

Si jeo lessa terra a un home pur terme dans & puis jeo confirme son estat sans plus parols mitter en le fait ~~parcel~~ <sup>il</sup> nad plus ~~grandeur~~ <sup>il</sup> estat que pur terme dans, sicome il avoit a devant. Mes si jeo releafe a luy, &c. il ad estat de franktenement.

Si jeo estant deins age lessa terre a un auter pur terme de 20. ans, & puis il grant le terre a un jauter 10. ans parcel de son terme en cest case, quant jeo sue de plein age, si jeo releafe al grantee de mon lessée, &c. cest releafe est void, pur ceo que il luy ad asc' *privity* per-entrer luy & moy, &c. Mes si jeo confirm son estat, ceo est bone. Mes si mon lessée grant tout son estat a un auter, <sup>Nota le lease d'un enfant n'est void mes voidable</sup> doncque mon releafe fait al grantee est bon & effectual.

Si home grant un rent charge issuant hors de son terre a un auter pur terme de son vie, & puis il confirma son estat en le dit rent, a aver & tener a luy in fee tail ou in fee simple cest confir' est void, quant a enlarge son estat, pur ceo que celui que confirme navoit asc' *reversion* en le rent. Mes si homo soit seisin in fee de rent service, on de rent charge, & il grant le rent, &c. autrement en, pur ceo que il avoit un reversion del rent.

So note the diversity between a rent newly created, and a rent *in esse*, 21 E.3.47. 15 E.4.8 b. *Pl. Com.* 35. 8 H.4.19.

But in the first case, the grantor may grant to the grantee for life, and his heirs, that he and his heirs shall distrain for the rent, &c. and this shall amount to a new grant, and yet amount to no double charge. *Ex paucis plurima concipit ingenium.*

## CHAP. X.

## Of Attornment.

Scot. 551. Fol. 309. a.

**A**ttornment, is an agreement of the Tenant to the grant of the Seignior, or of a Rent; or of the Donee in Tail, or Tenant for life or years, to a grant of a reversion or remainder made to another, *Bract. l. 2. fo. 81. Britt. f. 105. b. 176. & 177.*

*Si dominus Attornare possit servitium tenentis contra voluntatem tenentis, tale sequeretur inconveniens, quod possit eum subjugare capitali inimico suo, & per quod teneretur sacramentum fidelitatis facere ei qui eum damnificare intenderat.*

Every grant must take effect as to the substance thereof, in the life both of the grantor and the grantee, *1. fo. 104, 105. Shelleys Case.*

Since *Littleton* wrote, if a Fine be levied of a Seignior, &c. to another, to the use of a third person and his heirs, he and his heirs shall distrain without any Attornment, because he is in by the Statute of 27 H. 8. cap. 10. by transferring the state to the use, and so he is in by act in Law, *lib 6. fol. 68. Sir Moyses Finches Case.*

So it is if a man by Deed indented and inrolled according to the Statute, bargain and sell a Seignior, &c. to another, the Seignior shall passe without Attornment; and so it is of a Rent, a Reversion, and a Remainder, 27 H. 8. cap. 16. *Vide Scot. 1784.*

But if the Conusee of a Fine, before any Attornment by Deed indented and inrolled; bargain and sell the Seignior to another, the bargainee shall not distrain, because the bargainor could not distrain, *& sic de similibus; for Nemo potest*

*plus juris ad alium transferre quam ipse habet*, vide *Seff.* 149. where upon a Recovery, the Recoveror shall distrain and avow without Attornment.

347 A grant to the King, or by the King to another, is good without Attornment by his Prerogative, 49 E.3.4.34 H.6.8. 6 E.4. 13.

If there be Lord, Mesne and Tenant, and the Mesne grant over his Mesnalty by Deed, the Lord release to the Tenant, whereby the Mesnalty is extinct, and there is a rent by surplusage, an Attornment to the grant of this rent seck is good, although the quality of that part of the rent is altered, because it is altered by act in Law.

If a reversion of two acres be granted by Deed, and the lessor before Attornment levy a Fine of one of them, and the Tenant attorn to the grantee by Deed, this is good for the other acre.

If the reversion be granted of three acres, and the lessee agree to the said grant for one acre, this is good for all three, and so it is of an Attornment in Law, if the reversion of three acres be granted, and the lessee surrender one of the acres to the grantee &c. 18 E.3. *Variance* 63. 22 E.3. 18. l. 2. fo. 67 b. *Tookers case*, fo. 309 b.

Reg. the Attornment must be according to the grant, either expressly or impliedly, 39 H.6.3.

Impliedly, as if a reversion be granted to two by Deed, and the lessee Attorn to one of them according to the grant, this Attornment shall enure to both the grantees; and so it is if one grantee dye, the Attornment to the survivor is good, 11 H.7. 12.

If the Lord grant by Deed his Seigniority to A. for life, the remainder to B in fee, A. dyeth, and then the Tenant Attorn to B. this Attornment is void, because it is not according to the grant, for then B. should have a remainder, without any particular estate, 20 H.6.7.

If a reversion be granted to a man and a woman, they are to have moieties in Law; but if they intermarry, and then Attornment is had, they shall have no moieties, because

use it is by act in Law, *Pl. Com.* 187. 483.

If a feme grant a reversion to a man in fee, and marry with the grantee, the lessee Attorne to the husband, this is a good attornment in Law to the husband, 2 R. 2. *Attornment* 8.

If a reversion be granted by Deed to the use of I. S. and the lessee hearing the Deed read; or having notice of the contents thereof, Attorn to *Cestuy que use*, this is an implied 345 Attornment to the grantee, l. 4. fo. 61, *Hemings* case.

Se<sup>ct</sup>. 552. *Fo.* 310. a & b.

Note that *Littleton* expresseth not what estate is granted, and very materially, for if the former grant were in fee, and the latter grant were for life, and the Tenant doth first attorn to the 2d grantee, he cannot after attorn to the first grantee to make the fee simple pass, for that should not be according to the grant, but in that case the Attornment to the first is countermanded.

If a reversion upon an estate for yeares be granted in fee, and the lessor confirme the estate of the lessee for life, he cannot afterwards attorn. And so it is if the grantor before Attornment confirm the estate of the lessee for life in Tail, &c.

If a feme sole make a lease for life or yeares reserving a rent, and grant the reversion in fee, and taketh husband, this is a Countermand of the Attornment, 11 H. 7. 19.

If in the case that our Author here putteth of severall grantees, if the Tenant attorn to both of them, the Attornment is void, because it is not according to the grant.

If a reversion be granted for life, and after it is granted to the same grantee for yeares, and the lessee Attorn to both grants, it is void for the uncertainty, 11 H. 7. 12.

*A multo fortiori*, if the Lord by one Deed grant his Seignory to I. Bishop of *Loudon*, and to his heirs, and by another Deed to I. Bishop of *Loudon*, and to his successors, and the Tenant Attorne to both grants, the Attornment is void,

for albeit the grantee be but one, yet he hath several capacities, and the grants are several, and the Attornment is not according to either of the grants.

But if *A.* grant the reversion of black acre or white acre, & the lessee attorn to the grant, and after the grantee maketh his election, this Attornment is good, for albeit the state was incertaine, yet he Attorneth to the grant in such sort as it was made. And so note a diversity between one grant and several grants; and observe an Attornment good in expectation, which passed by the election subsequent.

*Señ. 553. Fol. 301.a.*

Note, that when a man maketh a feoffment of a Manor, the services doe not pass but remain in the feoffor, untill the Freeholders do attorn, and then the Attornment shall have relation to some purpose, and not to other; for albeit the Attornment be made many years after this feoffment, yet it shall have relation to make it passe out of the feoffor, *Ab initio*, even by the livery upon the feoffment; but not to charge the Tenants with any mean arrerages, or for Waste in the meane time, &c. *Temps E. 2. Attorn. 48 E. 3. 15.*

If a reversion of land be granted to an alien by Deed, who is made Denizen, and then the Attornment is made, the King upon Office found, shall have the land: for as to the state between the parties, it passed by the Deed *ab initio*, *P. 5 E. 3. Coram Rege Sussex in Thesaur. 21 E. 3. 47.*

If a man plead a feoffment of a Manor, he need not plead an Attornment of the Tenants, but (if it be material) it must be denied, or pleaded of the other side, *34 E. 3. Double Plea 24. 42. Ass. p. 6.*

And upon consideration had of all the Bookes touching this point, whether the services of the Freeholders do pass, wherein there have been three several opinions, viz. some have holden that the services do pass in the right, by the livery, as parcel of the Manor, but not to avow before Attornment, as in the case of the Fine. And others have holden,



holden, that they do passe in right and possession, to distrain without Attornment. 26 E.3. *per que servitia* 21. 8 H.4.1.b. 12 H.4.20H.6,7.35H 6 9 E.4.33. 13 H.7.14.a. 1 H.7.31. 4 E.4. *Attorn.* Br.30.

And the third opinion is, that in this case the said services passe neither in possession, nor in right, but until Attornment remaine in the Alienor as *Littleton* here holdeth; and so it was resolved. *P15 Eliq.* betweene *Brasbitsh*, and *Barwell*. vide H.14. *Eliq.* Rot. 508. in *Com B.*

*Señ. 590, 591. Fo. 324.*

Si home fait done en tail, ou lease pur terme de vie, ou pur terme dans del parcell del demesne d'un Manor, &c. Savant le reversion a tiel donor, ou lessor, &c. & puis il soit disseise del Manor, &c. & le disseisor mor. seise, &c. & son heir evant eins pur discens, uncore tiel donor, &c. distreina pur le rent arere; & tiel reversion apres tiel disseisin est sever del Manor en fait, comit que ne soit sever en droit.

And so note a diversitie between rents and services parcell of a Manor, and rents and Services incident to a reversion parcel of a Manor. And the reason of this diversitie is, for that as long as the donee in taile, lessee for life or lessee for yeares, are in possession, they preserve the reversion in the donor or lessor, and so long as the reversion continue in the donor or lessor, so long do the rents and services, which are incidents to the reversion belong to the donor or lessor. Neither can the donor or lessor be put out of his reversion, unless the donee, or lessee be out of their possession, &c. But if the donee or lessee make a regresse, and regain their estate and possession, thereby they doe *ipso facto* revelt the reversion in the donor or lessor.

And note, when a man is seised of a Manor and maketh a gift in taile, or Lease for life, &c. Of parcell of the demesne of the Manor; the reversion is part of the Manor, and by the grant of the Manor the reversion shall passe with the Attornment of the Donee or lessee. But if the Lord make a gift or a Lease for life of the whole Manor, except bl. acre parcell

parcell of the demesne of the Manor, and after he grant away his Manor, B. acre shall not passe, because during the estate taile, or Lease for life, it is severed from the Manor. And so note a diversity, that a reversion of part, may be parcell of a Manor in possession, but a part in possession cannot be parcell of the reversion of a Manor expectant upon any estate of freehold. But if a man make a Lease for yeares of a Manor except B. acre, and after grant away the Manor, B. acre shall passe, because the freehold being entire, it remaineth parcell of the Manor, and one *præcipe* of the whole Manor shall serve. But otherwise it is in case of a gift in taile, or Lease for life, excepting any part, there must be severall Writs of *Præcipe*, because the freehold is severall, 18. *Aff. p. 2.* 38 *H. 6.* 33. *Pl. Com. Fulmerstons case.* 103. *lib. 5.* 11. 22. 25. 19 *E. 2.* *breve* 845. 4 *E. 3. breve* 713.

Now let's Attorne to the precedent Sections.

*Sec. 554. Fol. 311. a.*

No man shall attorne to any grant of any Signiory, rent service, reversion, or remainder, but he that is immediately privy to the grantor.

*Sec. 556. Fol. 311. b.*

Here observe a diversity, betweene a rent service, and a rent charge, or a rent secke. And therefore (without respect of any privy) the disseisor onely in case of a rent charge, shall attorne, because he is Tenant of the freehold, but in case of a grant of a rent service, the attornment of the disseisor sufficeth. 21 *H. 6* 9 *b.*

It was holden by *Dyer* and *Mumson*, in the Argument of *Brace bridges* case; that if he that hath a rent charge, granteth it over for life, and the Tenant of the Land attorn thereunto, and after he grant the reversion of the rent charge, that the grantee for life may attorne alone; and that these words of *Littleton* are to be understood, when a rent charge, or rent secke is granted in possession, and a *quid juris clamat*, in that case,

case, did lye againſt the grantee for life. 46 E. 3. 27. 2 H. 6. 9.  
*Vide Littleton. Sect 549. and 553.*

A man maketh a Lease for life, and after grants to A. a rent charge out of the reversion. A. grants the rent over, he in the reversion muſt Attorne, and not the Tenant of the freehold, for that the freehold is not charged with the rent, for a releaſe made to him by the grantee, doth not extinguiſh the rent; and *Littleton* is to be underſtood, that the Tenant of the freehold muſt attorne, when the freehold is charged,  
*Vide fo. 312. a.*

*Littleton* ſpeaketh of five kindes of inheritances whereto an Attornment is requiſite. 1. Of a Seignory rent ſervice, &c. 2. Of a rent charge. 3. Of rent ſeck. 4. Of a reversion. 5. Of a remainder of Lands. For the Tenant ſhall never need to Attorne, but when there is tenure, attendance, remainder, or payment of a rent. And th reſore if an annuity, common of paſture, common of eſtovers, be granted for life, or years, &c. the reversion may be granted without any Attornment. 21 H. 7. 1. 1 H. 5. 1. 37. Aff. 14. 36. Aff p 3. 31 H. 8. Attorn Br. 59.

Sect. 557. Fol. 312. b.

In this caſe of *Littleton* by this eſcheat of the remainder, the Seignory is extinct, for the fee ſimple of the Seignory being extinct, there cannot remain a particular eſtate for life thereof in reſpect of the tenure, and attendance over 3. 3 H. 6. 1. old tenures 107. 15 E. 4. 15. a. per *Littleton*.

But otherwiſe it is of a rent charge in fee, for if that be granted for life, and after he in the reversion purchaſe the Land, ſo as the reversion of the rent charge is extinct, yet the grantee for life, ſhall enjoy the rent during his life, for there is no tenure or attendance in this caſe.

Sect. 558, 559. Fo. 313. a.

*Littleton* now commeth to ſpeak of Attornments in Law 341: or implied. 3 E. 3. 42. 15 E 3. Attorne 11.

If the Lord grant his Signiory to the Tenant of the land,

and to a stranger ; and the Tenant accept the Deed, this acceptance is a good Attornment to extinguish the one moiety, and to vest the other moiety in the grantee.

Suspense, is when a Seigniorie, Rent, profit apprehend, &c. by reason of unity of possession of the Rent, Seigniorie, &c. of the Land out of which they issue, are not in esse for a time ; and they are said to be extinguished, when they are gone for ever, and can never be revived, that is when one man hath as high and perdurable estate in the one, as in the other.

*Sec. 560. Fol. 313. a. & b.*

Note, that albeit a grant may enure by way of release, and a release to the Tenant for life, doth work an absolute extinguishment, whereof he in the remainder shall take benefit, yet the Law shall never make any construction against the purport of the grant to the prejudice of any, or against the meaning of the parties, &c. *Vide lib. &c.*

*Sec. 562. Fo. 314. a.*

Note a diversity when the whole estate in the Seigniorie is suspended, and when but part of the estate in the Seigniorie is suspended but for terme of life, and therefore as to all things concerning the right it hath its being, but as the possession during the particular estate, the grantee shall take no benefit, therefore during that time, he shall have no rent service, Wardship, Relief, Heriot, &c. because these belong to the possession, but if the Tenant dyeth without heir, the Tenancy shall escheat unto the grantee, for that it is in the right, and yet when the Seigniorie is revived by the death of the Tenant, there shall be wardship, as if the Tenant marry with the Seignioresse and dyeth, his heire within age, they shall have the wardship of the heire. Also in the case that *Littleton* here putteth, albeit the Seigniorie be suspended but for life, yet some hold, that he cannot grant it over, because the grantee took it suspended, and it was never in esse in him, but if the Tenant make a Lease for years, or for life

to the Lord, there the Lord may grant it over, because the Seigniorie was in esse in him, and the fee simple of the Seigniorie is not suspended, but if the Lord disseise the Tenant, or the Tenant infeoffe the Lord upon condition, there the whole estate in the Seigniorie is suspended; and therefore he cannot during the suspension, take benefit of any escheat or grant over his Seigniorie. 34. *Ass. p. 15. 16 E. 3. vouch. 83. 5 E. 3. Twongs case.*

*Seff. 563. 564. Fo. 314.*

Attornment for part, cannot be void for that, and good it cannot be unlesse it be for the whole. 4 E. 3. 55. *Malmans case.* 5 E. 4. 2. 7 H. 4. 10. 35 H. 6. 8. *per pri/or.*

And payment of any parcell of the services, is an agreement in Law to the grant. 40 E. 3. 34.

*Intentio inservire debet legibus, non leges intentioni.* 20 H. 6.

Judgement in *scire facias* pur parcell de le services est bone attorn. en ley, commit que il est presume, quod iudicium redditur in invitum. 48 E. 3. 24. 37 H. 6. 14. *per Moyle.* 17 E. 3. 29.

Note that in case of Deed, nothing passeth before attorn<sup>339</sup> ment.

In the case of the fine, the thing granted passeth as to the State, but not to distraine, &c. without Attornment. \ In the case of the King, the thing granted doth passe both in estate and in privy to distreine, &c. without Attornment, unlesse it be of Lands or Tenements, that are parcell of the Duchy of Lancaster, and lye out of the County Palatine. <sup>353</sup>  
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*Seff. 565. Fo. 315. b.*

Note a diversity between money given by way of Attornment, and where it is given as parcell of the Rent, by way of seisin of the Rent. And therefore a payment in name of seisin is more beneficiall for the grantee, because this is both an actuall seisin, and an Attornment in Law, and yet being given before the day in which the Rent is due, it shall not be abated out of the Rent. 39 H. 6. 3. 26. 5 E. 4. 2. *Vide* 8. 235. 7 H. 4. 2. *Attorny Br.* 97.

*Seff.*

Scot. 566.

As of an Attornment, so a seisin of a rent by the hands of one joynt-tenant is good for al, and a seisin of part of the rent is a good seisin of the whole, *Lib. 2. fo. 67. Bookers case.*

If either the grantor, or grantee dye, the Attornment is countermanded, but if the Tenant dye, he that hath his Estate may Attorn at any time; If the Tenant grant over his estate, his Assignee may attorn, *Lib. 4. fo. 8. l. 6. fo. 57. l. 9. fo. 34. 4 H. 6. 29. 18 E. 4. 10.*

If an Infant hath Lands by purchase, or by descent, he shall be compelled to Attorn in a *per que servitia*. 42 E. 3. Age 33. 18 H. 6. 2. l. 9. fo. 84. 85. *Coyns case*. 4 M. Dy. 137. 7 E. 2. Age 140.

If an infant be lessee, he shall be compelled to Attorn in a *quid Juris clamat*, the Attornment of an Infant to a grant by Deed is good, and shall bind him, because it is lawfull, albeit he be not upon that grant by Deed compellable to Attorne.

Scot. 567. Fol. 315. b.

The grant of the reversion by Deed, with the attornment of lessee for years, do countervaille in Law, a feoffment by livery, as to the passing of the freehold and inheritance.

And Tenant by statute Merchant, or Staple, or by Elegit, must also attorn, for the grantee may have a *venire facias ad computat.* or tender the mony, &c. and discharge the Land, and if the reversion be granted by Fine, they shall be compelled to attorn in a *Quid juris clamat* 6 E. 3. 53. 25 E. 3. 53. *Br. Attor.* 48. 32 E. 3. *(circ facias* 101. *Dy.* 1. a.

And so the Executors that have the Land untill the debts be paid, must attorn upon the grant of the reversion, although they have not any certain terme for years.

Scot. 568. Fo. 316. a.

If Tenant in Dower, or by the curtesie grant over his or her estate, and the heire grant over the reversion, the Tenant in Dower, or by the Curtesie may attorn, because at the time

time of the grant made, they were attendant to the heire in reversion, and the grantee cannot be Tenant in Dower, or by the Curtesie; and if the reversion be granted by Fine, the Fine must suppose that the Tenant in Dower, or by the Curtesie, did hold the land, albeit they had formerly granted over their estate, and albeit the reversion doth passe by the Fine, yet the *Quid juris clamat* must be brought against him that was Tenant, at the time of the note levied; and the grantee of the reversion must bring an action of waste against the Assignee of Tenant in Dower, or by the Curtesie, for they themselves cannot hold of any but of the heire; and therefore in respect of the privity they shall attorn, and be subject to an action of waste, as long as the reversion remaineth in the heire, albeit they have granted over their whole estate: and note that if the grantee of the reversion, doth bring an Action of waste against the Assignee of Tenant by the Curtesie, the plainriffe must rehearse the Statute, which prove:h that no prohibition of waste, in that case lay at the common Law, as it did, if the heir had brought it against the Tenant by the Curtesie himselfe: and therefore some doe hold, that if the heir do grant over the reversion, that the Attornment of the Assignee of the Tenant by Curtesie, or of Tenant in Dower is sufficient, because they afterward, must be attendant, and subject to the Action of waste. 10. H. 4. Attornment 16. 11 H. 4. 18. F. N. B. 55 E. Reg. fo. 72. 4 E. 3. 26.

If the reversion of lessee for life be granted, and lessee for life Assigne over his estate, the lessee cannot attorne, but the attornment of the Assignee is good, because it becometh that the Tenant of the land doe attorne, and after the Assignment there is no tenure or attendance, &c. between the lessee and him in reversion. 18 E. 4. 10. b. 26 E. 3. 62. 5 H. 5. 10.

Señ. 569, 570, 571, 552, 573. Fo 316. b.

No *Quid juris clamat* lyeth against Tenant in taile, but if a man make a gift in taile, the remainder in fee, and the Seigniorie, or rent charge issuing out of the land be granted by Fine,



Fine, the Couftee shall maintaine a *per que servitia*, or a *quem redditum*, and compeil him to Attorne, for herein his estate of inheritance is no priviledge to him; for that a Tenant in fee simple (as his Estate was at the Common Law) is also compellable in these cases to attorne.

*Lou le reversion est dependant sur lestate del franktenement, suffit que le tenant del franktenement attorn sur grant del reversion, &c. Si lease pur terme d'ans, &c. ou done en le taile, soit fait reserve un rent, per le grant del reversion en tiel case, le rent passara pur ceo que tiel rent est incident al reversion, & nemy è converso.*

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If a man let land to another for his life, and after he confirme by his Deed, the estate of the Tenant for life, the remainder to another in fee, and the Tenant for life accept the Deed, &c. Albeit he in remainder in this case hath no remedy to come to the Deed, during the life of Tenant for life, yet because he is privy in Estate, he shall not maintaine an action of waste, without shewing the Deed, but when the remainder is once executed, he shall not need to shew the Deed, *Vide Pl. Com. Colthirfs case. D & St. Ch. 20. fol. 93, 94. Pl. Com. 149. Throckmortons case. 45 E. 3. 14 15. 11 H. 4. 39. 14 H. 4. 31.*

As in Phylick, *nullum medicamentum est idem omnibus*, so in Law one forme or president of conveyance will not fit all Cases.

*Seet. 574. Fo. 318. a.*

If one joyntenant make a Lease for years, reserving a rent and dye, the survivor shall not have the rent, & therefore *Litleton* here addeth materially, for the privity that was between the Tenant for life, and them in the reversion. 2 *Elix. Dycr* 176.

Tenant for life shall not be compelled to attorn in a *Quid juris clamat* upon the grant of a reversion by Fine holden of the King himselfe without licence: For it is a generall rule, that when the grant by fine is defeasible, there the Tenant shall be compelled to attorne. 45 E. 3. 6. b. 13 *Elix. Dy.* 188. *Lib. 3. fo. 86. Justice Windhams case. 36 H. 6. 24.*

As if an Infant levy a Fine, this is defeasible by Writ of Error during his minority, and therefore the Tenant shall not be compelled to attorn.

So if the land be holden in ancient Demesne, and he in the reversion levy a Fine of the reversion at the Common Law, this is reversible in a Writ of Deceit, &c. 5 E. 3. 25. 3 E. 3. *Ancient Demesne* 16.

So if an Alienation be in Mortmain, the Lord Paramount may defeat it, &c. 17 E. 3. 7. 22 E. 3. 18.

So if a Tenant in Tail had levied a Fine it was defeasible by the issue in Tail, 24 E. 3. 25. b. 37 H. 6. 33. 48 E. 3. 23.

But now the Statute of 4 H. 7. 32 H. 8. having given a further strength to Fines to barre the issue in Taile, the reason of the Common Law being taken away, the Tenant in this case shall be compelled to attorn. *Windams Case*, *ubi supra*.

*Stat. 576. 577. fol. 319. a.*

Where a lease is made for life, saving the reversion to the lessor, if the lessor disleise the lessee, and make a feoffment in fee, if the Tenant for life enter, and make Wast, the feoffee shall have a Writ of Wast without any other Attornment; for the lessee shall not be misconduant of the Feoffments that were made of and upon the same land. And the reason of the Attornment is, because the whole fee simple pass by the feoffment, and the lessee by his Regress, leaveth the reversion in the feoffee, which is a good attornment. The same Law it is of a Tenant by statute merchant, or Staple or Elegit; and so it is of a lease for yeares, 46 E. 3. 30. b. 2 H. 5. 4. 5 H. 5. 12. *Brasbriches case*, P. 15 *Elix*.

Some doe hold, that in that case, if the lessee for life doe recover in assize, this is no Attornment, because he comes to it by course of Law, and not by his voluntary act. And yet in that case as in the case of the Fine, the state of the reversion is in the feoffee.

But others doe hold it all one in case of a recovery and a regress,

regres, 18 E. 3. 48. b. lib. 6. fol. 60. b. Sir Moyle Fiuches Case.

If the lessor disseise Tenant for life, or ouste Tenant for years, and make a feoffment in fee, by this the rent reserved upon the lease for life or years is not extinguished; but by the regres of the lessee the rent is revived, because it is incident to the reversion.

But if a man be seised of a rent in fee, and disseise the Tenant of the land, and make a feoffment in fee, the Tenant re-enter, the rent is not revived.

157 And so note a diversity between a rent incident to a reversion, and a rent not incident to a reversion, 9 H. 6. 16. Dean of *Pauls Case*, 20 Eliz.

If a man make a lease for life, and then grant the reversion for life, and the lessee attorn, and after the lessor disseise the lessee for life, and make a feoffment in fee, and the lessee re-enter, this shall leave a reversion in the grantee for life, and another reversion in the feoffee, and yet this is no Attornment in Law of the grantee for life, because he doth no act, nor assent to any which might amount to an Attornment in Law. *Et res inter alios acta alteri nocere non debet.* Neither hath the grantee for life, the land in possession: So as he may well be misconusant of the feoffment made upon the land, and so out of the reason of *Littleton*. But yet the reversion in fee doth pass to the feoffee.

*See. 578, 579. fo. 319. b. & 320. a.*

Where the Ancestor taketh an estate of Freehold, and after a remainder is limited to his right heirs, the fee simple vesteth in himselfe, as well as if it had been limited to him and his heirs, for his right heirs are in this case words of limitation of estate, and not a Purchase. Otherwise it is where the Ancestor taketh but an estate for yeares: As if a lease for years be made to A. the remainder to B. in Tail, the remainder to the right heirs of A. there the remainder vesteth not in A. but the right heirs shall take by purchase, if A. dye during the estate Tail; for as the Ancestor and the heir are

*Correlativa* of Inheritances, so are the Testator and Executor, and the Intestate and Administrator of Chattels. *Quod vanum & inutile est, lex non requirit.* Vide Sect. 194. 273. fo. 320. a.

The Conusee of a Fine before Attornment, cannot distress, because an Avowry is in lieu of an action, and thereunto privity is requisite. So likewise, and for the same cause he can have no action of Waste, nor Writ of Entry *ad Com. legem*, or in *confimili casu*, or in *casu proviso*, Writ of Customs, and Services, nor Writ of Ward, &c. 8 E. 3. 44. 34 H. 6. 7. 12 E. 4. 4. 40 E. 3. 7. 5 H. 5. 12. 3 E. 2. Droit 33.

But if a man make a lease for years, and grant the reversion by Fine, if the lessee be ousted, and the Conusee disseised, the Conusee without Attornment shall maintain an Assize, for this Writ is maintained against a stranger, where there needeth no privity: and such things as the Lord may seize or enter into without suing any action, there the Conusee before any Attornment may take benefit thereof, as to seize a Ward or Heriot, or to enter into the Lands or Tenements of a Ward, or escheated to him, or to enter for an alienation of Tenant for life or years, or of Tenant by statute Merchant, Staple or Elegit, to his disinherison.

Sect. 580, 581, 582. Fo. 320. a. b.

It is said in our Books, that if Tenant for life have a privilege not to be impeachable of Waste, or any other privilege, if he doth attorn without saving his privilege, that he hath lost it, which is to be understood, where he attorneth in a *Quid juris clamat* brought by the Conusee of a Fine, for that the Writ suppoeth him to be but a bare Tenant for life, and by his generall Attornment according to the Writ he is barred for ever to claim any privilege but a bare estate for life. But if upon a grant of the reversion by Deed, the Tenant for life doth attorn, he loseth no privilege, for there can be no conclusion or barre by the Attornment in *pallo*: and so it is of an Attornment in Law.

As

351. As if the lessor disseise the lessee for life, and make a Feoffment in fee, and the lessee re enter, &c. 43 E. 3. 5. 45 E. 3. 6. 39 H. 6. 25. F. N. B. 136. b.

But in the *Quid juris clamat*, if the Plaintiff be within age, so as he cannot acknowledge the privilege, the Tenant shall not be compelled to attorn untill his full age, when he may acknowledge it, 43 E. 3. 5.

But otherwise it is (as some hold) if a *Quid juris clamat* be brought by Baron and feme, the privilege shall be entered into the Roll, notwithstanding she is a feme covert, 45 E. 3. 11. a. Vet. N. B. in per que servitia, 39 H. 6. 25. 18 E. 4. 7.

And in a *per que servitia* brought by the Conusee of the Mesne, the Tenant may shew, that he held by Homage Ancestrel, and saving to him his Warrant and Acquitall, he is ready to attorn. So if the Tenant hath any other Acquitall, and the Mesne levy a Fine to one for life, the remainder to another in fee, the Tenant for life bringeth a *per que servit*, and the Tenant is ready to attorn, saving his Acquitall, and the Plaintiffe acknowledge it, and thereupon Tenant attorn, Tenant for life dyeth; in this case albeit Reg. the Attornment to the Tenant for life, is an Attornment to him in remainder, yet in this case he in the remainder shall not distrain, till he hath acknowledged the Acquitall, which must be in a *per que servit*. brought by him against the Tenant, vide S. 557.

Sec. 583. Fol. 321. d.

Note a diversity between an act in Law, that giveth one inheritance in lieu of another, and an act in Law that conveyeth the estate of the Conusee only. Of the former Littleton here putteth an Example, of the escheat of the Mesnalty, which drowneth the Seigniorie Paramount, and therefore reason would that the Lord by this act in Law should have as much benefit of the Mesnalty escheated, as he had of the Seigniorie that was drowned, and he hath no remedy to compell the Tenant to Attornment.

Also the Lord cometh to the Mesnalty by a Seigniorie Paramount,

ramount, and therefore needeth no Attornment. As if lessee for life be of a Manor, and he surrender his estate to the lessor, there needs no Attornment of the Tenants, because the lessor is in by a Title Paramount, *Temps B. 2. Attor. 18. 39. H. 38. per Prisot. lib. 6. f. 68. Sir M. Finches Case. 5 H. 7. 18. per Cur.*

But if the Conusee dye, and the Law casteth his Seigniorie upon his heir by Discent, he shall not be in any better estate then his ancestor was, because he claimeth as heir meerly by the Conusee.

*Sec. 584. Fol. 321. b. vide, &c.*

If a man make a lease for life or years, and after levy a Fine to A. to the use of B. and his heirs, B shall distrain, and have an action of Waste, albeit the Conusee never had any Attornment, because the reversion is vested in him by force of the Statute, and hath no remedy to compell the lessee to attorn, 27 H. 8. c. 10.

*Sec. 585. 586. Fol. 322. a. b.*

Here doth Littleton put a case where a man may have a Seigniorie rent, reversion or remainder, meerly by the act of the party, and may distrain, and have any action without any Attornment; and that is by devise of Lands deviseable by Custom, when Littleton wrote, by the last Will and Testament of the owner, 34 H. 6. 6. 5 H. 7. 18, F N B. 121. n.

*Omne Testamentum, morte consummatum ultima voluntas testatoris est perimplenda secundum veram intentionem suam, & reipublica interest suprema hominum testamenta rata haberi.* The Will of the Devisor expressed by his Testament, shall be performed according to the intent of the Devisor, and it shall not lie in the power of the Tenant or lessee to frustrate the Will of the Devisor by denying his Attornment, *vide S. 167. Brit. fol. 78. & 212. b.*

Sect. 587, 588, 589. Fol. 323. a b

The disseisor cannot disseise the Lord of the Rents or Services, without the Attornment of the Tenants to the disseisor; for seeing an Attornment is requisite to a feoffment and other lawfull Conveyances, *A fortiori*, a disseisor or other wrong doer shall not gain them without Attornment. The like Law is of an Abator, and an Intruder. But albeit the disseisor hath once gotten the Attornment of the Tenants, and payment of their rents, yet may they refuse afterwards for the avoiding of their charge. And here the Attornment of the Tenant of a Manor to a disseisor of the Demesns, shall dispossesse the Lord of the rents and services parcell of the Manor, because Demesns, Rents & Services make but one intire Manor, and the Demesns are the principall: but otherwise it is of rents and services in gross, 6 H. 7. 14. 11 H. 7. 28. 11 H. 4. 14. a. b.

For a man cannot be disseised of a rent service in gross, rent charge, or rent seck by Attornment, or payment of the rent to a stranger but at his election; for the Rule of Law is, *Nemo redditam alterius invito Domino percipere aut possidere potest*, & vide S. 237, 238, 239, 240.

What be disseisins of rent services, rent charge, and rent secks, and payment to a stranger, is none of them, but at the Lords election, 24 E. 3. 4. 1 E. 5. 5.

A discent of a rent in gross bindeth not the right owner, but that he may distrain, albeit he admitted himself out of possession, and determined his election, as by bringing of an Affize, &c. 5 E. 4. 1. 23 H. 3. 0. Aff. 439. 16 Aff. p. 15.



## \*\*\* CHAP. XI.

## Of Discontinuance.

Sect. 592. Fol. 325. a.

**D**iscontinuare nihil aliud significat quàm intermittere desuescere, interrompere, 8 H. 4. 8. b. 11 H. 4. 85. b.

A discontinuance of estates in Lands or Tenements, is properly (in legall understanding) an alienation made or suffered by Tenant in Taile, or by any that is seised in *auter droit*, whereby the issue in Tail, or the heir or successor, or those in reversion or remainder are driven to their action, and cannot enter. I have added (*properly*) by good warrant of our Author himself, for Sect. 470. he useth Discontinuance for a divesting or displacing of a reversion, though the entry be not taken away. Also *vide* the Statute of 1 E. 6. c. 7. 31. Eliz. c. 2. lib. 7. fo. 30, 31. *le case de Discontin. de processe.*

When *Littleton* wrote, the estate in Lands and Tenemens might have been discontinued five maner of ways, *viz.* By Feoffment, by Fine, by Release with Warranty, Confirmation with Warranty, and by suffering of a Recovery of a *Præcipe quod red.* and this was to the prejudice of five maner of persons, *viz.* of Wives, of Heirs, of Successors, of those in Reversion, and of those in Remainder. But for Wives and their Heirs, and for Successors, the Law is altered by Acts of Parliament since *Littleton* wrote.

Sect. 593. Fol. 325. b.

*Nota*, that in Law the Covent, albeit they be Regular, and dead persons in Law, yet are they said in Law to be *Capitulum* to the *Abbot*, as well as the Dean and Chapter that be *Secular*

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cular to the Bishop. But it is to be observed, That a sole Body Politick that hath the absolute right in them, as an Abbot, Bishop, &c. may make a discontinuance; but a Corporation aggregate of many, as Dean and Chapter, Warden and Chaplains, &c. cannot make any discent, for if any joyn the grant is good, and if the Dean, Warden, &c. make it alone where the Body is aggregate of many, it is void, and worketh a disseisin, 21 E. 4. 86. vide Sect. 528 & 648. By the Statute of 1 Eliz. c. 10. & 1 Jac. c. 3. Bishops, and all other Ecclesiasticall persons, are disabled to alien, or discontinue any of their Ecclesiasticall Livings.

Sect. 594. Fo. 326. a.

By the *pur view* of the Statute of 32 H. 8. c. 28. the wife and her heirs after the decease of her husband, may enter into the Lands and Tenements of the wife, notwithstanding the alienation of her husband, Dyer 4 & 5. P. & M. 146. 3 El. Dyer 191. l. 8. f. 71, 72. Greveleys Case.

If the husband levy a Fine with Proclamations, and dye, the wife must enter, or avoid the estate of the Conusee within five years, or else she is barred for ever by the Statute of 4 H. 7. for the Statute of 32 H. 8. doth help the Discontinuance, but not the barre; and the Statute speaketh of a Fine, and not of a Fine with Proclamations, 6 E. 6. Dyer 72. b. 4 H. 7. c. 14.

Feme Tenant in Tail taketh husband, the husband maketh a feoffment in fee, the wife before entry dyeth without issue, he in the reversion or remainder may enter. For 1. The reversion or remainder cannot be discontinued in this case, because the estate Tail is not discontinued. 2. The words of the Statute be, Shall not be prejudiciall, &c. to the wife or her heirs, or such as shall have Right, Title or Interest by the death of such wife, but the same wife and her heirs, &c. shall, or lawfully may enter, &c. By which words, the entry of him in the reversion or remainder in that case is preserved. The husband is Tenant in Tail, the remainder to the wife in Tail, the husband make a feoffment in

in fee, by this the husband by the Common Law did only discontinue his own Estate taile, but his wifes remainder, but at this day after the death of the husband without issue, the wife may enter by the said act of 32 H.8.

If the husband hath issue, and maketh a feoffment of his wifes land, and the wife dyeth, the heire of the wife shall not enter during the husbands life, neither by the Common law, nor by the Statute. 8 E.2. tit. cui in vita. 26 34. E.1. *ibid.* 30. 10 E.3. 12. Dy. 21. *Eliz.* 363.

*Señ. 565. Fo. 326.b.*

By the Statute of 11 H.7. ca. 20. If the woman hath any Estate in tail joyntly with her husband, or only to her self, or to her use in any lands, or hereditaments of the inheritance or purchase of her husband, or given to the husband and wife in taile, by any of the Ancestors of the husband, or by any other person seised to the use of the husband, or his Ancestors, and shall hereafter being sole, or with any other after taken husband discontinue, &c. the same; every such discontinuance shall be void, and that it shall be lawfull for every person to whom the interest title or inheritance, after the decease of the said woman should appertain, to enter, &c. So as if such a feme Tenant in taile, do make any discontinuance in fee, in taile, or for life, although it be with warranty, yet this doth not take away the entry after her death, either of the issue, or of him in reversion or remainder. *Vide Señ. 697 l. 3. fo. 50, 51. Sir George Browner case, and l. 3. f. 60. &c. Lin. Coll. case P. 1. f. 176. Mildmayer case. Dy. 3. & 4. P. M. 146. & 8 El. Dy. 448 & 15 El. 340. 19 El. 354. & 20 El. 362. 27 H.8. 23. l. 5. f. 79. Fitz. case, and Grevelys case. l. 8. fo. 71, &c.*

If Lands were intailed to a man and his wife, and to the heirs of their two bodies, and the husband had made a feoffment in fee and dyed, and then the wife dyed, this had been a discontinuance at the Common Law: for the title of the issue is as heir of both their bodies, and not as heir to a

ny one of them, and his entry must ensue his title or action, But this is remedied by the Statute of 32 H. 8.

Tenant in taile shall have a *quod permittat*. 4 E. 3. 38. 43 E. 3. 25. 4 E. 4. 25. F. N. B. 124.

And he shall have a writ of Customes and services, *le debet, & solet*, but shall not have it in the debt only. 2 E. 2. droit 28.

So he shall have a *Seffa ad molendum* in *le debet & solet*, but not in the *debet tantum*. F. N. B. 123.

Tenant in taile shall have a writ of entry in *consimili casu*, & an *Admesurement*, & a *nativo habendo*, *cessavit*, *eschear*, *waiste*, &c. 21 E. 3. 11. 5 E. 3. 23. 11 H. 4. 49.

But tenant in taile, shall not have a writ of right *sur disclaimer*, nor a *quo jure*, nor a *ne injuste vexes*, nor a *nuper obit*, or *Rationabile parte*, nor a *Mordant*, nor a *sur cui in vita*, for these and the like, none but Tenant in fee shall have: and the highest writ that a Tenant in taile can have, is a *Formedon*. 2 E. 3. droit 28. 13 H. 7. 24. 5 E. 4. 2. 20 E. 3. *Avowry* 131. F. N. B. 10. 46 E. 3. *cui in vita* 33.

Stat. 596, 597. Fo. 327. b.

It is provided by the Statutes of W. 2. c. 1 *De donis cond. quod non habeant illi quibus tenementum sic fuerit datum potestatem alienandi*, &c. So as these words (*non habent potestatem alienandi*) do work these effects, viz. as to lands, that a feoffment barreth not the issue, of his action, but worketh a discontinuance to barre him of his entry; as to rents, or any thing in esse, that lye in grant, that the said words do <sup>take away</sup> his power to make any discontinuance: as to rents, &c. newly created that they take away his power to make them to continue longer, than during his life. 18 E. 3. 12. 24 E. 3. 28. 36 A. 8. 5 E. 4. 3. 4 H. 7. 17. Pl. Com. Smith, and Stapletons case.

But there is a diversity between alienation, working a discontinuance of an estate, which taketh away an entry; and an alienation working, divesting or displacing of estates, which take away no entry. As if there be Tenant for life, the remainder to A. in taile, the remainder to B. in fee, if

Tenant

Tenant for life doth alien in fee, this doth divest and displace the remainders, but worketh no discontinuance; and so note that to every discontinuance, there is necessary a divesting, or displacing the estate, and turning the same to a right: for if it be not turned to a right, they that have the Estate, cannot be driven to an action; & therefore such inheritances as lye in grant, cannot by grant be discontinued, because such a grant divests no Estate, but passeth only that which he may lawfully grant, and so the Estate it self doth descend, revert, or remaine, as shall be said hereafter.

364.

A. maketh a gift in tail to B. who maketh a gift in tail to C. C. maketh a feoffment in fee, and dyeth without issue. B. hath issue and dyeth, the issue of B. shall enter, for albeit the feoffment of C. did discontinue in reversion of the fee simple, which B. had gained upon the estate tail made to C. yet it could not discontinue the right of entaile which B. had, which was discontinued before: and therefore when C. died without issue, then did the discontinuance of the Estate taile of B. which passed by his livery cease, and consequently the entry of the issue of B. lawfull. \* Also note that a discontinuance made by the husband, did take away the entry only of the wife, and her heirs by the common Law, and not of any other which claimed by title paramount above the discontinuance. As if lands had beene given the husband and wife and to a third person, and to their heires, and the husband had made a feoffment in fee, this had been a discontinuance of the one moiety, and a disseisin of the other moiety: if the husband had dyed, the survivor should have entred in the whole, for he claimed not under the discontinuance, but by title paramount, from the first feoffor, and seeing the right by law doth survive, the Law doth give him a remedy, to take advantage thereof by entry, for other remedy, for that moiety he could not have.

Sec. 600. Fo. 328 a.

It is a Rule in Law, that the disseisee, or any other that

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hath

hath a right onely, by his release, or confirmation, cannot make any discontinuance: because nothing can passe thereby, but that which may lawfully passe. 9 E.4.18.12 E.4.11. 5 H.4.8. 21 H.6.58.

By a feoffment the freehold doth passe by open livery to the feoffee, and by a Release, a bare right; *Sic nota diversim.*

*Scff. 601, 602, 603. fo. 328.b. & 329.a.*

A warranty being added to a release, or confirmation, and descending upon him, that right hath to the lands makech a discontinuance, otherwise it is out of the reason of the Law, and worketh no discontinuance, if the warranty descend upon another.

If Tenant in taile release to his disseisor, and bind him and his heires to warranty, this is a discontinuance. For if the issue in taile, should enter in this case, the warranty (which is so much favoured in Law) should be destroyed: and therefore to the end, that if Asssets in fee simple do descend, he to whom the release is made, may plead the same, and barre the demandant, by which meanes all rights and advantages are saved.

*Scff. 604.*

When a Bishop, &c. make an Estate, Lease, grant or rent-charge, warranty, or any other act, which may tend to the diminution of the revenues of the Bishoprick, &c. which should maintaine the successor, there the privation, or translation of the Bishop, &c. is all one with his death. But Where the Bishop is patron and ordinary, and confirmeth a Lease made by the parson, without the Deane and Chapter; and after the Parson dyeth, and the Bishop collateth another, and then is translated, yet his confirmation remaineth good, for the revenues that are to maintaine the successor, are not thereby diminished; and so it is in case of resignation. 29 E. 3. 16. *ibid garr. 99. cl. contr.*

*Scff*

Vide Sect. 608, 609, 610, 611, 612, 613. Fo. 330, 331. a.

Tiels choses queux passent en asc' cases de tenant en le taile tant-  
seulement per voy de grant, ou per confirmation, ou per releascrien po-  
it passe pur faire estate a celuy, a que tiel grant, ou confirmation ou  
releas est fait, forsque cco que le tenant en taile poit droitulermment  
faire, & cco ne forsque pur terme de la vie, &c.

Hereby it appeareth, that a feoffment in fee (albeit it be  
by parol) is of greater operation and estimation in Law, then  
a grant of a reversion by Deed, though it be inrolled, and At-  
tornment of the lessee for yeares of a release, or a confirma-  
tion by Deed.

Also having regard to the issue in taile, and to them in  
reversion, or remainder, Tenant in taile cannot lawfully  
make a greater Estate than for terme of his life. But in re-  
gard of himselfe a release or grant made by him, leaveth no  
reversion in him, but put the same in Abeyance, so as after  
such release or grant made, he shall not have any action of  
wast; and he shall not enter for a forfeiture, &c. 13 H. 10. a.  
Br. Release 95.

Sect. 614. Fo. 331. b.

The Feoffee of Tenant in taile hath no rightfull Estate,  
having respect to two persons, the one is the donor, whose  
reversion is divested and displaced, and the other is to the  
issue in taile, who is driven to his action to recover his  
right.

*Deforcicare*, signifieth, to withhold Lands or Tenements from 303  
the right owner, in which case either the entry of the right  
owner is taken away, or the deforceor holdeth it so fast, as  
the right owner is driven to his reall *præcipe*, wherein it is  
said, unde A. *eum iuste deforceat*, or the deforceor so distur-  
beth the right owner, as he cannot enjoy his owne. *Bras. l. 4. fo.*  
*238. Fleta. l. 5. ca. 11.*

There is a writ called a *Quod ei deform.* and lyeth where  
Tenant in taile, or tenant for life, loseth by default, by the  
Staute he shall have a *Quod ei deforc.* againt the recoveror,  
and



and yet he cometh in by course of Law. *Westm. 2. ca. 4.*

*Sec. 615, 616, 617, 618. Fo. 332.a.b.*

123. An Advowson is a thing that lyeth in grant, and passeth not by livery of seisin. 5 E. 3. 58. 21 E. 3. 37, 38. 43 E. 3. 1.b. 11 H. 6. 4. 5 H. 7. 37. 18 H. 8. 16. *El. Dy. 323.b.*

If a remainder, or a rent service, or a rent charge, or an Advowson, or a common, or any other inheritance that lyeth in grant, be granted by Tenant in taile, it is no discontinuance. *Brac. l. 2. f. 3. & f. 266. 318. Brit. fo. 187. Mir. ca. 2. S. 17. Fle. l. 3. c. 15.*

395. For that it is a maxim in Law, That a grant by Deed of such things as do ly in grant, and not in livery of seisin, do worke no discontinuance. But the particular reason is, for that of such things the grant or Tenant in taile worketh no wrong, either to the issue in taile, or to him in reversion, or remainder, for nothing doth passe, but onely during the life of Tenant in taile, which is lawfull, and every discontinuance worketh a wrong. 6 E. 3. 56. 4 H. 7. 17. 21 H. 7. 42. 21 H. 6. 52. 53. 5 E. 4. 3. 21 E. 4. 5. 12. R. 2. discontinuance 35. *Br. 19 E. 3. Br. 468. Pl. Com 435. 18 Aff. p. 2.*

361. If Tenant in taile of a rent service, &c. or of a reversion, or remainder in taile, &c. grant the same in fee with warranty, and leaveth assents in fee simple and dyeth, this is neither bar, nor discontinuance to the issue in taile, but he may distreine for the rent or service, or enter into the Land, after the decease of Tenant for life. But if the issue bringeth a Formedon in the disceding, and admitting himself out of possession, then he shall be barred by the warranty, and Assents. 33. E. 3. from. 47. 13 H. 7. 10. 36. *Aff. 8. 4 H. 7. 17.*

Tenant in taile, of a rent disseises the Tenant of the Land, and makes a feoffment in fee with warranty and dyeth, this is no discontinuance of the rent. 3 H. 7. 12. 9 E. 4. 22.

And where the thing doth ly in livery, as Lands and Tenements, yet if to the conveyance of the freehold, or inheritance, no livery of seisin is requisite, it worketh no discontinuance.

As if Tenant in Taile exchange Lands, &c. or if the King being Tenant in Taile, grant by his Letters Patents the Lands in fee, there is no discontinuance wrought. 38 H. 8. Pat. Br. 10.1. Pl Com 233. l. 1. f. 16. *Altwoods* case.

Of a thing that lyeth in grant, though it be granted by Fine, yet it is no discontinuance, and this is Regularly true, 48 E. 3. 23.

If Tenant in taile make a Lease for years of Lands, and after levy a Fine, this is a discontinuance; for a Fine is Feoffment of Record, and the freehold passeth. 15 E. 4. discontinuance, 30.

But if Tenant in taile make a Lease for his owne life, and after levy a Fine, this is no discontinuance, because the reversion expectant upon a Statute of freehold, which lyeth only in grant, passeth thereby. 6 H. 8. 56, 57.

#### Sec. 620.

*Si Tenant in tail fait Lease a Terme de vie le lessee, &c. & apres tenant in taile, grant per son fait le reve: son in fee a un autre, & le tenant a terme de vie attornant, & mor. vivant le Tenant in taile, & le grantee del reversion enter, &c. en la vie le Tenant in taile douque ceo est un discontinuance en fee.* For when the reversion in this case executed in the life of Tenant in taile, it is equivalent in judgement of Law to a Feoffment in Fee; for the state for life passed by livery. 32 E. 3. discontinuance 2. 3 H. 4. 9. 34. Aff. 6. p. 4. 38. Aff. 6. p. 6.

But if the Tenant in taile make a Lease for Terme of the life of the Lessee, &c. and grant over the reversion and dyeth, and after the death of Tenant in taile, the Lessee dye, the entry of the issue is lawfull, because by the death of the Lessee, the discontinuance is determined, and consequently the grant made of the reversion, gained upon that discontinuance, is void also.

If Tenant in taile make a Lease for life the remainder in fee, this is an absolute discontinuance, albeit the remainder be not executed in the life of Tenant in taile, because all is one estate and passeth by livery; and so note a diversity between

tween a grant of a reversion, and a limitation of a remainder, 21 H.6.52,53.

B. Tenant in Tail makes a gift in Tail to A. and after B. releases to A. and his heirs, and after A. dyeth without issue, the issue of the first Donee may enter upon the collateral heir, because A. had not seisin, and execution upon the reversion of the land in the demesne as of fee.

But if Tenant in Tail make a lease for the life of the lessee, and after release to him and his heirs, this is an absolute discontinuance, because the fee simple is executed in the life of Tenant in Tail.

If Tenant in Tail of a Manor whereunto an Advowson is appendant, make a feoffment in fee by Deed of one acre, with the Advowson, and the Church becommeth void, and the feoffee present, Tenant in Tail dyeth, the Church becommeth void, the issue shall not present untill he hath recon- tinued the acre. But if the feoffee had not executed the same by Presentment, then the issue in Tail should have presented. And so was it at the Common Law, of the husband seised in the right of his wife, *Mutatis mutandis*, 34 E. 1. Qu. imp. 179. 22 E. 3. 6. 17 E. 3. 3. 33 E. 3. qu. imp. 196. 23 Ass. 8.

If the husband and wife make a lease for life by Deed of the wives land, reserving a rent, the husband dyeth, this was a Discontinuance at the Common Law for life, and yet the reversion was not discontinued, but remained in the wife, otherwise it is as if the husband had made the lease alone, 38 E. 3. 32. 18 Ass. 2. 18 E. 3. 54. 22 H. 6. 24.

If Tenant in Tail make a lease for life of the lessee, and after grant the reversion with Warranty, and dyeth before execution, this is no discontinuance, because the discontinuance was but for life, and the Warranty cannot enlarge the same. *Bro. Discontinuance* 3. 21 H. 7. 11 l. 1. fo. 85. l. 10. fo. 96, 97.

If Tenant in Tail make a Lease for life, and grant the reversion in fee, and the lessee attorn, and that grantee grant it over, and the lessee attorn, and then the lessee for life dyeth,

eth, so as the reversion is executed in the life of Tenant in Tail, yet this is no Discontinuance, because he is not in of the grant of the Tenant in Tail, but of his grantee, 15 E.4. *Discont.* 30. *Vide Sect. 642. fol. 333 b.*

If Tenant in Tail make a lease for life, and after disseiseth the lessee for life, and maketh a feoffment in fee, the lessee dyeth, and then Tenant in Tail dyeth, albeit the fee be executed, yet for that the fee was not executed by lawful means, it is no Discontinuance.

*Sect. 625. Fol. 335. a.*

*Littleton* here putteth his case of a reversion immediately expectant upon the gift in Tail. Also it is to be intended of a feoffment made to the donor solely or only, for if the donee infeoff the donor, and a stranger, this is a Discontinuance of the whole land, 41 *Aff.* 2. 41 E.3. 2. 28 H 8. *Dyer* 12. lib. 1. fo. 140. in *Chudleys* case, 9 E.4. 24. b.

But if Tenant for life make a lease for his own life to the lessor, the remainder to the lessor and stranger in fee; in this case forasmuch as the limitation of the fee should work the wrong it enureth to the lessor as a surrender for the one moiety, and a forfeiture as to the remainder of the stranger. *Nul poit discont' lestate en taile, si non que il discont' le reversion, &c. ou le remainder, &c.* 40 *Aff.* 36. 61 *Aff.* 36. 18 E.3. 45. *FN B.* 142 a. *Pl. Com.* 555.

And therefore if the reversion or remainder be in the King, the Tenant in Tail cannot discontinue the estate Tail. But Tenant in Tail, the reversion in the King, might have barred the estate Tail by a Common recovery, untill the Statute of 33 H. 18. cap. 20 which restraineth such a Tenant in Tail, but that Common Recovery never barred, nor discontinued the Kings reversion, 33 H 8. *Tail. Br.* 41.

If a feme covert be Tenant for life, and the husband make a Feoffment in fee, and the lessor enter for the forfeiture, here is the reversion revested, and yet the Discontinuance remained at the Common Law, 27 *Aff.* p. 60. 29 *Aff.* 43. 11 *Aff.* 11. 16. *Aff.* 11 18 E. 3. 45.

*Sect.*

Sect. 632. Fol. 336. b.

*Si le Baron soit seisee de cert. terre en droit sa feme, & fait feoffment in fee sur Condition & devy, &c.* When the heir in this case hath entred for the Condition broken, and hath avoided the feoffment, the estate of the heir vanisheth away, and presently the estate vesteth in the feme or her heirs, without any Entry or Claim by her or them: for the heir enters in respect of the Condition upon the reall Contract, and not of any right; and if the husband himselfe had re-entred, the state had vested in his Wife. And therefore where *Littleton* and our Books say, That the wife shall enter upon the heir, the meaning is, That after the re-entry of the heir, she may enter, 4 H. 6. 2. 9 H. 7. 24. b. l. 8. f. 43, 44. *Whittinghams Case.*

Sect. 633. Fo 337. b.

If the husband within age take a wife feme Tenant in Tail generall, and the husband make a gift in Tail, and dyeth within age, in this case the wife may enter, as *Littleton* here holdeth; or the heir of the husband, in respect of the new reversion descended unto him, may enter. But if the heir enter, presently thereupon his estate vanisheth.

If husband and wife be both within age, and they by deed indented joyn in a Feoffment reserving a rent, the husband dyeth, the wife may enter, or have a *Dum fuit infra ætat.* But if she were of full age, she shall not have a *Dum fuit infra ætat.* for the Non-age of her husband, albeit they be but one person in Law, 14 E. 3. Breve 282. 14 E. 3. *Dum fuit, &c.* 6. F. N. B. 892.

Sect. 634.

2. *Foytenants eſant deins age, font un feoffment in fee, & l'un de les infants devy, celuy que survesquist poit enter en tentionly, &c.* For that they may joyn in a Writ of Right, and therefore the Right shall survive. But they cannot joyn in a *Dum fuit infra ætat.* because the Nonage of the one, is not the Nonage of

of the other, 21 E. 3. 50. 18 E. 2. Breve 83 1. 6 E. 3. 4. 9 H. 6. 6. 19 H. 6. 6. 39 H. 6. 42. 34 H. 6. 31.

In this case if one joyntenant had made a Feoffment in fee and dyed, the right should not have survived, for the joynture was severed for a time.

If two joyntenants be, and the one is of full age, and the other within age, and both they make a Feoffment in fee, and he of full age dyeth, The Infant shall enter, or have a *Dum fuit*, &c. but for the moiety.

Sect. 635. Fol. 337. b.

*Serroit encounter reason, que un feoffment fait per ccluy que ne fuit able de faire tiel feoffment grevava, ou ledare auer, de sollar eux de lour entre &c. Meliorem facere potest minor condic' deteriorem nequaquam, Bract. fo. 14. Brit. f. 88. a.*

*Nota*, a speciall heir shall take advantage of the infancy of the Ancestor. As if Tenant in Tail of an acre of the Custom of Borough English, make a Feoffment in fee within age, and dyeth, the yongest Son shall avoid it, for he is privy in blood, and claimeth by Discent from the Infant.

And so note, that a cause to enter by reason of infancy, is not like to Conditions, Warranty, and Estoppels, which ever descend to the heir at the Common Law.

Sect. 636. Fol. 338. a.

Note, there be 3 kinds of Surrender, viz. a Surrender properly taken at the Common Law, which is a yielding up of an estate for life or years to him that hath an immediate estate in reversion or remainder, wherein the estate for life or years may drown by mutuall agreement between them.

2. A Surrender by Custom of Lands holden by Coppy, or of Customary estate, *vide* Sect. 74. *homo com. gen.* \*\* And

3. A Surrender improperly taken (*vide* S. 550.) of a Deed. And so of a Surrender of a Patent, and of a rent newly created, and of a fee simple to the King, 2 El. Dyer 176.

14 H. 7. 3. 27 Ass. 37. 49 E. 3. 2. 11 H. 4. 2. 12 H. 4. 21. 13 H. 4. 13.

And

And a Surrendr properly taken, is of two sorts, viz.  
 1: A Surrender in Deed, by expresse words, whereof *Littleton* here putteth an Example; and he putteth his case of a Surrender of an estate in possession, for a right cannot be surendered. 2. A Surrender in Law, which in some cases is of greater force, then a Surrender in Deed.

As if a man make a lease for years to begin at Michaelmas next, this future interest cannot be surrendred, because there is no reversion wherein it may drown, but by a surrender in Law it may be drowned.

As if the Lessee before Michaelmas take a new lease for years, either to begin presently or at Michaelmas, this is a surrender in Law of the former lease. *Fortior, et equior est dispositio legis quam hominis*, 14 H.8.15. 50 E.3.6. 44 Aff.3. 35 H.8. *Dyer* 37. 8 Aff.20. 4 M.*Dyer* 141. 11 El. *Dyer* 280. 21 H.7.6. 14 H.7.4. li.6. fo.69. Sir *Moyl Finches Case*.

Also there is a Surrender without Deed, whereof *Littleton* putteth here an Example of an estate for life of lands. And also there is a Surrender by Deed, and that is of things that lie in grant, 16 H.6.33. 27 Aff.46. 14 H.7.4. 1 H.6.1 Pl. Com. 541.

And albeit a particular estate be made of lands by Deed, yet may it be surrendred without Deed, in respect of the nature and quality of the thing demised, because the particular might have beene made without Deed: and so on the other side.

If a man be \*Tenant by the Curtesie, or Tenant in Dower of an Advowson, Rent, or other thing that lies in grant, albeit the estate begin without Deed, yet in respect of the nature and quality of the thing that lies in grant, it cannot be surrendred without Deed. And so if a lease for life be made of lands, the remainder for life, albeit the remainder for life began without Deed, yet because remainder and reversions, though they be of lands, are things that lie in grant, they cannot be surrendred without Deed. *Qu. si le firs la feme poit enter, &c.*

It is holden of some, That after the surrender, the issue in  
 Tail



Tail during the life of Tenant for life may enter, for that having regard to the issue, the state for life is drowned, and consequently the inheritance gained by the lease, is by the acceptance of the surrender vanished and gone; as if Tenant in Tail make a lease for life, whereby he gaineth a new reversion, if Tenant for life surrender to the Tenant in Tail, the estate for life being drowned, the reversion gained by wrong is vanished, &c. and he is Tenant in Tail again against the opinion *Obiter* of Portington, 21 H.6.53. *vide lib. fo. 338.b.*  
~~Mes il n'est rien a faire, par ceo que tout le matter est icy tran-~~  
~~scribe verbatim.~~

But herein are two diversities (Notable) The first is that having regard to the parties to the surrender, the estate is absolutely drowned, as in this case between the lessee, and the second Baron. But having regard to strangers, who were not parties or privies thereunto, lest by a voluntary surrender they may receive prejudice, touching any right or interest they had before the surrender, the estate surrendered hath in consideration of Law a Continuance.

As if a reversion be granted with Warranty, and Tenant for life surrender, the grantee shall not have execution in value against the grantor, who is a stranger, during the life of Tenant for life; for this surrender shall work no prejudice to the grantee, who is a stranger, 45 E.3.13. 5 H.5.9. 9 E.4.18.

So if Tenant for life surrender to him in reversion, being within age, he shall not have his age, for that should be a prejudice to a stranger, who is become Demandant in a real action, 40 E.3.13. 1 H.6.1. 24 E.3.77.

If Tenant for life grant a rent charge, and after surrender, yet the rent remaineth; for to that purpose he cometh in under the Charge, 5 H.5.8. 26 Aff.38. 7 H.6.1. b.

If a Bishop be seised of a rent charge in fee, the Tenant of the land infeof the Bishop and his successors, the Lord enter for the Mortmain, he shall hold it discharged of the rent, for the entry for the Mortmain affirmeth the alienation

in Mortmain, and the Lord claimeth under his estate; but if Tenant for life grant a rent in fee, and after infeof the grantee, and the lessor enter for the forfeiture, the rent is revived, for the lessor doth claim above the Feoffment. But if I grant the reversion of my Tenant for life to another for term of his life, and Tenant for life attorn, now is the waste of Tenant for life dishpunishable, 48 E. 3. 16.

Afterwards I release to the grantee for life and his heirs, or grant the reversion to him and his heirs, now albeit the Tenant for life be a stranger to it, yet because he attorneth to the grantee for life, the estate for life which the grantee had, shall have no continuance in the eye of Law as to him, but he shall be punished for Waste done afterwards.

(2) The second diversity is, That for the benefit of an estranger, the estate for life is absolutely determined.

As if he in the reversion make a lease for years, or grant a rent charge, &c. and then the lessee for life surrender, the lease or rent shall commence maintenance.

So in the case of *Littleton*, first between the lessee, and the second husband, the state for life is determined. And 2. for the benefit of the issue it shall be so adjudged in Law. Here note a diversity when it is to the prejudice of a stranger, and when it is for his benefit.

If a man make a lease to A. for life, reserving a rent of 40.s. to him and his heirs, the remainder to B. for life, the lessor grant the reversion in fee to B. A. attorneth, B. shall not have the rent, for that although the fee simple do drown the remainder for life between them, yet as to a stranger it is in esse, and therefore B. shall not have the rent, but his heir shall have it.

135 A Master of an Hospital being a sole Corporation, by the consent of his Brethren makes a lease for years of part of the possession of the Hospital; afterwards the lessee for years is made Master, the term is drowned, for a man cannot have a term for years in his own right, and a Freehold en antier droit, to consist together (as if a man lessee for years take a feme lessor to wife.) But a man may have a Freehold in

389.

in his own right, and a term *in auter droit*; and therefore if a man lessor take the feme lessee to wife, the term is not drawnd, but he is possessed of the term in her right during the Coverture, 6 H. 4. 7. Pl. Com. 419.

So if the lessee make the lessor his executor, the term is not drowned, 32 H. 8. Br. Surr. 52.

But if it had been a Corporation aggregate of many, the making of the lessee Master had not extinguished the term, no more then if the lessee had been made one of the Brethren of the Hospital.

Sect. 637. Fo. 339. a.

*Nota que un estate tail ne poit estre discont, mes la ou cestuy que fait discont. fuit un foitz seisee (quia, omnis privatio præsупponit habitum) perforce de la tail, sinon que foitz per reason de garrantie, &c.* for in many cases a Warranty added to a Conveyance, is said to make a Discontinuance, *ab effectu*, because it taketh away the entry of him that right hath, as a Discontinuance doth. 382

As if Tenant in Tail be disseised, and dyeth, the issue in Tail releaseth to the disseisor with Warranty, &c. 9 E. 4. 19. 11 E. 4. 11. 21 E. 4. 97. Vide Sect. 592, 596, 597, 601, 640, 658.

Sect. 642. Fo. 340. b.

Albeit the reversion in this case be executed in the Lord by the Escheat in the life of Tenant in Tail, yet because he is not in by the Tenant in Tail, but by Escheat, it worketh no discontinuance. But if it had been executed in the life of Tenant in Tail, in the grantee which was in by Tenant in Tail, then the Lord by Escheat should have taken advantage by it, Vide Sect. 620. lib. 1. fo. 136. & lib. 2. fo. 62, 63.

Sect. 643, 644, & 645.

In whom the fee simple of the Gleab, &c. is, is a question 377.

in our Books : Some hold that it is in the Patron, 8 H.6.24  
12 H.8.8. But that cannot be for two Reasons.

1. For that in the beginning the Land was given to the Parson and his successors, and the Patron is no successor.

2. The words of the Writ of *Juris utrum*, be, *Si sit libera Eleemosyna ecclesie de D.* and not of the Patron, Reg. 307. a. 45 E.3. *Eschang.* 12 H.8.9.

Some others do hold, That the fee simple is in the Parson and Ordinary, FNB 19.I. But this cannot be for the causes abovesaid; and therefore of necessity the fee simple is in abeyance, as *Littleton* saith.

Upon consideration of all our Books, I observe this diversity, That a Parson or Vicar for the benefit of the Church, and of his successor, if in some cases esteemed in Law to have a fee simple qualified, but to do any thing to the prejudice of successors in many cases, the Law adjudgeth him to have in effect but an estate for life. *Causæ Ecclesiæ publicis causis æquiparantur, & summa ratio est quæ pro religione facit*, Bract. lib. 3 f. 226. *Et Ecclesia fungitur vice minoris, meliorem facere potest condic' suam, deter' nequaquam*, Brit. f. 143.

As a Parson, Vicar, Archdeacon, Prebend, Chantry, Priest, &c. may have an action of Waste, and in the Writ it shall be said. *Ad exhereditationem ecclesiæ, &c ipsius B. or Præbendæ ipsius A.* FNB 55.d. & 57 E.2. 10 H.7.5.

And the Parson &c. that maketh a lease for life, shall have a *Consimili casu* during the life of the lessee, and a Writ of Entry *ad Com. legem* after his death, or a Writ *ad terminum qui præterit*, or a *quod permittat* in the *debet*, and none can maintain any of these Writs but a Tenant in fee simple or fee tail, FNB l.m.n. 20 H.3. *Jur. utr. Temps E.3. Jur. utr.* 141. 14 E.3. *ibid.* 4. FNB 50. 30 E.3. 26. 21 E.3. 11. Entry 10. FNB 206. fol. Reg. 237. 4 E.4.2. 8 E.3. Entry 3. 7 E.3. 54.55.

And a Parson &c. may receive Homage, which Tenant for life cannot do, Temps E. 1. *Encumbent* 19.

Item, a Parson &c. shall have a Writ of Mesne, and a *Contra formam scoffmenti*, FNB 49.l. 50. a. fo. 341.b.

But

But a parson cannot make a discontinuance, for that should be to the prejudice of his successor, to take away his entry, and to drive him to a reall action. Also if a parson, &c. make a Lease for years, reserving a rent and dyeth, the Lease is determined by his death, as if Tenant for life had made a Lease, no acceptance of the rent by the successor can make it good. Also in a reall action, a Parson, Vicar, Archdeacon, &c. shall have aid of the Parron, and ordinary, as Tenant for life shall have. 20 E.3. aid. 30. 25 E.3. 54. 8 E.3. 45. 8 H. 6. 24. 11 H. 6. 9. 6 E.3. 45. 43. *Aff. p. 13. F.N.B. 129.*

So as it is evident, that to many purposes a parson hath but in effect an Estate for life, and to many a qualified fee simple; but the entire fee and right is not in him, and that is the reason that he cannot discontinue the fee simple that he hath not, nor ever had; for as it hath been said, *Omnis privatio presupponit habitum*, and for the same cause he cannot have a writ of right, nor a writ of right in his nature as a writ of right for disclaimer of customes and services, *ne injuste vexes, rationalibus divisis, quo jure, &c.*

But here it appeareth by *Littleton*, that such bodies politick or corporate as have a sole seisin, and may have a writ of right for that the fee and right is in them (albeit they cannot absolutely convey away their Lands, &c. without assent of others) may make a discontinuance, as a Bishop, an Abbot, a Dean, a Master of an Hospital, &c. But this is to be understood, where a Dean, &c. are solely seised of distinct possessions, for if the body that is seised be aggregate of many, as the Dean and Chapter, Master and confrates, &c. then the Feoffment of the Dean or Master is so far from a discontinuance, as it is a disseisin.

But at this day, the Bishop, Dean, Master of an Hospital, &c. that have the fee and right in them, cannot discontinue, neither can they, or any Parson, Vicar, Arch-Deacon, Prebendary, or any other having any Ecclesiastical living with assent of Dean and Chapter, Patron and Ordinary, or the consent of any others, make any Lease, gift, grant, or Conveyance, Estate, Charge or Incumbrance to binde his succes-

fers or others, then for term of 21 years, or three lives in possession, whereupon the accustomed rent or more shall be reserved, *Vide S. 528. 993. 19c. 1 El.c. 18. 13 El.c. 10. 174c. 3. l. 2. fol. 46. l. 4. fol. 76. & 20 El. 5. fo. 9. & 14. l. 6. fo. 37. l. 7. fo. 8. l. 11. fo. 67. 27 H. 8. 31 H. 8. 32 H. 8. 37 H. 8. 1 E. 6. &c.*

These points concerning Hospitals were resolved by the Justices, *P. 24. Eliz. The Cheney's case, l. 2. fo. 48, 49. Evesque de Cant. case.*

First, That no Hospital was given to the Crown by the Statute of 27 H. 8. nor any Hospital is within the Statute of 31 H. 8. of Monasteries, but only Religious and Ecclesiastical Hospitals, and that no Lay Hospital was within those Statutes.

2. If upon the Foundation of any Hospital, or after it was ordained, That one or divers Priests should be maintained within the Hospital, to celebrate Divine Service to the poor, and to pray for the Soul of the Founder, and all Christian Souls, or the like, and that the poor of such Hospitals should make the like Orisons; yet such an Hospital is not within the said Statute, for the Hospital is Lay and not Religious; and all, or the most part of ancient Lay Hospitals were founded or ordained after the like sort, and the makers of those Statutes never intended to overthrow works of Charity, but to take away the abuse.

3. That no Hospital was given to the King by the Statute of 37 H. 8. but in two cases, where the Donors, Founders, or Patrons, &c. had entred and expelled the Priests, Wardens, &c. between the 4. of Febr. 27 H. 8. and the 25. of Decemb. 37 H. 8. or where King H. 8. by Commission according to that Act should enter, and seise the same; but that determined by the death of that King, *l. 1. f. 14. Porters Case.*

4. That the Statute of 1 E. 6. extended not to any Hospital whatsoever, either Lay or Religious, as by the same appeareth, *l. 4. 111, 113, 114, 116. in Lamberts case.*

*Nota*, of Hospitals, some are Corporations aggregate of many,

many, as of Master or Warden, &c. and his Confratres: some where the Master or Warden hath only the estate of Inheritance in him, and the Brethren and Sisters power to consent, having College and Common Seal; some where the Master or Warden hath the estate in him, but hath no College and Common Seal, and such a Master or Warden shall have a *Juris utrum*; and of these Hospitals some be Eligible, some Donative, and some Presentative, 14 E. 3. *Juris utrum*, 4.

Sect. 646, 647. Fol. 342. b.

If Tenant *pur terme dauter vie* dyeth, the Freehold is said to be in Abeyance until the occupant enter.

If a man make a lease for life, the remainder to the right heirs of I. S. the fee simple is an Abeyance, untill I. S. dyeth, *Vide* Sect. 1. King. 4. *Æn. Insequiturque solo, & caput inter ubi lacondit.*

Also when a Parson dyeth, we say, That the Freehold (of the Gleab, &c.) is in *consideratione sue intelligentia legis*, because a successor is in expectation to take it, 24 E. 3. 63.

So it is of a Bishop, Abbot, Dean, Archdeacon, Prebend, Vicar, and of every other sole Corporation, or Body Politick, Presentative, Elective or Donative; which inheritances put in Abeyance, are by some called *Hæreditates jacentes*, *Bract. l. 1. c. 2.* and some say, *Que le fee est en baiaunce*, Brit. 6. 249.

Sect. 641. Fol. 343. b.

*Principium est quasi primum caput*, from which many cases have their original or beginning, which is so strong, as it suffereth no contradiction. *Contra negantem principia non est disputandum*, 11 H. 4. 9.

Note a diversity, when the right of fee simple is perpetually by Judgement of Law in Abeyance, without any expectation to come in esse, there he hath the qualified fee *Concurrent' his que in jure requiruntur*, may charge or alien it, as in the case of Parson, Vicar, Prebend, &c.



But where the fee simple is in Abeyance, and by possibility may every hour come in *esse*; As if a lease for life be made, the remainder to the right heirs of I.S. the fee simple cannot be charged, till I.S. be dead.

Lands intailed may be charged in fee, for the estate Tail may be cut off by Fine or Recovery.

Also the estate Tail may continue, and yet Tenant in tail may lawfully charge the Land, and binde the issue in Tail, 44 E. 3. 21, 22.

As if a disseisor make a gift in Tail, and the Donee in consideration of a Release by the disseisee of all his right to the Donee, grant a rent charge to the disseisee and his heirs, proportionable to the value of his right, this shall binde the issue in Tail, *Vide Sect. 1. Bridgewaters Case, & 59. fol. 48. b.* Which Lands by the Rule of *Littleton* may be charged; and therefore if the owner of those 13 acres grant a rent charge out of those 13 acres, generally lying in the Meadow of eighty, without mentioning where they lie particularly, there as the state in the land removes, the charge removes also.

If the Parson dye, and in time of Vacation, the Patron of the assent of the Ordinary, ~~and~~ the Patron and Ordinary grant an Annuity or rent charge out of the Gleab, this shall binde the succeeding Parsons for ever.

A Church Parochial may be Donative, and exempt from all Ordinary Jurisdiction, and the Incumbent may resign to the Patron, and not to the Ordinary, neither can the Ordinary visit, but the Patron by Commissioners to be appointed by him. And by *Littletons* Rule, The Patron and Incumbent may charge the Gleab, and albeit it be Donative by a Layman, yet *merè Laicus* is not capable of it, but an able Clerk *infra sacros ordines* is; for albeit he come in by Lay Donation, and not by admission, or institution; yet his function is spiritual. *Vide* 133, 530. 11 E. 3. *Fur. utr.* 3. 8. *Ass.* 29. 31. 13 *Ass.* 2.

As the King may create Donatives exempt from the visitation of the Ordinary, so he may by his Charter license any Bishop

subject to found such a Church or Chappel, and to ordain that it shall be Donative and not Presentable, and to be visited by the Founder, and not by the Ordinary. And thus began Donatives in England, whereof common persons were Patrons, *F.N.B.* 35 E.4.2. A.B. *Dyer* 10.El.f. 273. 14 El. cap. 5. 2 H.5.cap.1.

*Ordinarius*, is he that hath ordinary Jurisdiction in causes Ecclesiastical, immediate to the King and his Courts of Common Law, for the better execution of Justice, as the Bishop, &c. Regularly according to the Ecclesiastical Laws allowed by the Laws of this Realm, viz. which are not against the Common Law (whereof the Kings Prerogative is a principal part) nor against the Statute and Customs of the Realm, The Ordinary and other Ecclesiastical Judges do proceed in Causes within their Conusance; and this Jurisdiction was so bounded by the ancient Common Laws of the Realm, and so declared by Act of Parliament, 25 H.8. c.19. 33 H.6.34. 32 H.6. 28.

Note, that institution is a good plenary against a Common person (but not against the King, unless he be inducted) and that is the cause that Regularly plenary shall be tried by the Bishop, because the Church is full by institution, which is a spiritual act, but void or not void shall be tried, by the Common Law, 22 H.6.27. 38 E.3.4.

At the Common Law if an usurpation had been had upon an Infant or feme Covert, having an Advowson by descent, or upon Tenant for life, &c. the Infant, feme Covert, and he in the reversion were driven to their Writ of Right of Advowson; for at the Common Law if the Church were once full, the Incumbent could nor be removed, and plenary was a good plea in a *Qu. imp.* or Affize of dar. Presentment; and the reason of this was, to the intent that the Incumbent might quickly intend and apply himself to his spiritual charge: And secondly, the Law intended, That the Bishop that had Cure of Soules within his Dioceffe, would admit and institute an able man, &c. 6 E.3. 28. 39.52.

Nota,

If the King do present to a Church, and his Clerk is admitted and instituted, yet before induction, the King may repeal and revoke his Presentation. But Regularly no man can be put out of possession of his Advowson, but by admission and institution upon an usurpation by a Presentation to the Church; *Cum aliquis jus presentandi non habens presen-taverit, &c.* and not by collation of the Bishop, 45 E. 3. 35. 38 E. 3. 4. 13 Bl. Dyer 292. 18 El. Dyer 348. 14 E. 4. 2. 7H. 4. 32. fol. 344.b.

*Nota*, that an usurpation upon a presentation, shall not only put out of possession him that hath right of presentation, but right of Collation also. Therefore at this day the Incumbent shall be removed by a *Qu. imp.* or Assize of dar' presentment, if there be not a plenary by six moneths, before the Teste of the Writ, but then the Incumbent must be named in the Writ, or else he shall never be removed, 9 H. 6. 32. & 56. 19 H. 6. 68.

At the Common Law if hanging the *Qu. imp.* against the Ordinary for refusing of his Clerk, and before the Church were full, the Patron brought a *Qu. imp.* against the Bishop, and hanging the Suit, the Bishop admit and institute a Clerk, at the presentation of another, in this if Judgement be given for the Patron against the Bishop, the Patron shall have a Writ to the Bishop, and remove the Incumbent that came in *pendente lite* by usurpation, for *pendente lite nihil innovetur*, and therefore at the common Law it was good policy, to bring the *Qu. imp.* against the Bishop, as speedily as might be. So it is good policy at this day to name the Bishop in the *Qu. imp.* for then he shall not present by lapse, 30 E. 3. *Qu. imp.* Stattham. 5 E. 4. 115. 9 E. 4. 30.

*Seft.* 649, 650. fol. 345.a.

If Tenant in Tail of lands holden of the King, be attainted of Felony, and the King after Office seiseth the same, the estate Tail is in Abeyance, there said to be in suspense, 19 H. 6. 60. 29 Ass. P. Com. 562. 563. *Walsingham's Case.*

Tenant

Tenant for life, the remainder in Tail, the remainder to the right heirs of Tenant for life, Tenant for life grants to a man and his heirs, both estates do passe, 44 Aff. 28. 44 B. 3. 10.

*Jus sive rectum* signifieth properly and specially in Writs and pleadings; when an estate is turned to a right as by discent, disseisin, &c. where it shall be said, *Quid jus descendit, & non terra*, 20 H. 6. 9.

But right doth also include the estate in esse in Conveyances, and therefore if Tenant in fee simple make a lease for years, and release all his right in the land to the lessee and his heirs, the whole estate in fee simple passeth. *Vide Sect.* 465. *Pl. Com.* 484. lib. 8. fol. 153. *Atthams Case*, 39 H. 6. 38.

And so commonly in *Fines*, the right of the land includeth and passeth the state of the land, as A. *cognovit teneamenta predicta esse jus ipsius B.* &c. and the Statute saith, *Jus suum defendere* (which is) *statum suum*. W. 2. cap. 3. *Pl. Com.* 484. & 487. b.

And note, That there is *jus recuperandi*, *jus intrandi*, *jus habendi*, *jus retinendi*, *jus percipiendi*, *jus possidendi*, fo. 345. b.

Title properly is, when a man hath a lawful cause of entry into lands whereof another is seised, for the which he can have no action, as Title of Condition, Title of Mortmain, &c. *Vide S.* 429, 659, &c.

Every right is a Title, but every Title is not such a right, for which an action lyeth, and therefore *Titulus est justa causa possidendi quod nostrum est*.

As by a release of a right a Title is released, so by release of a Title a right is released also.

Interest, *ex vi termini*, extendeth to Estates; Rights and Titles that a man hath of, in, to, or out of Lands; and by the grant of *totum interesse suum* in such lands, as well reversions as possessions in fee simple shall passe, *Pl. Com.* 374. *Seignior Zouches Case*, & 487, 488. *Nichol. Nichols Case*, 23 H. 8. *Tail. Br.* 32. 16 El. *Dyer* 325. b.

If Tenant for life be, the remainder in Tail, and he in the

re-

381.

remainder in Tail release to the Tenant for life all his right and state in the land: Hereby it is said in in our Books, That the estate of the lessee is not enlarged, but the release serveth to this purpose, to put the state Tail into Abeyance, so as after that he in the remainder cannot have an action of Waste, 43 Aff.p. 13. 41 E. 3. Waste 83. 11 H. 4. 67. 14 H. 7. 10. Pl. com. 482. per Dyer 27 H. 8. 20. Yet in that case (saving reformation) the lessee for life hath an estate for the life of Tenant in Tail expectant upon his own life, 42 E. 3. 23.

But if Tenant in fee release to his Tenant for life all his right, yet he shall have an action of Waste; and if Tenant in Tail make a lease for his own life, he shall have an action of Waste, F N B 60. H 42 E. 3. 18. 41 E. 3. Waste 83.

Seff. 658. Fol. 347. b.

373.

Here Littleton doth adde a Limitation to that which in this Chapter he had generally said, viz. That an estate Tail cannot be discontinued, but where he that maketh the discontinuance was once seised by force of the Tail; which is to be understood, when he is seised of the Freehold and Inheritance of the estate in Tail, and not where he is seised of a remainder, or a reversion expectant upon a Feehold, which Freehold is ever much respected in Law, Vide 637, 592, 596, 597, 601, 640, 641.

## CHAF. XII.

## Of Remitter.

Sect. 659. Fo. 348.a.

**L** Ou home ad 2 Titles a terres ou tenemens. Et adonques est l'adjudge eins per force de son eigne title, ceo est a luy die un Remitter, pur ceo que ley luy mitter destr, eins en la terre &c. per le plus eigne & sure title. Quod prius est, verius est, & quod prius est tempore, potius est jure.

A Remitter is an operation in Law, upon the meeting of an ancient right remediable, and a latter state in one person where there is no folly in him, whereby the ancient right is restored and set up again, and the new defeasible estate ceased and vanished away, 25 Aff.p. 4. 11 H. 4. 50.a.

Here in this case (Titles) includeth Rights, for being properly taken as in case of a Condition, Mortmain, Assent to a Ravisher, &c. there is no Remitter wrought unto them, because these are but bare Titles of Entry, for the which no action is given, but a Remitter must be to a precedent right. And Littleton in this Chapter putteth all his cases, only of Remitters to rights remediable. 429. & 650. Sect. &c. 34 H. 8 Remit. Br. 50. 44 E. 3. Attaint. 22. 38 Aff.p. 7. 38,

Note two things: 1. That this Remitter is wrought in this case by operation of Law upon the Freehold in Law descended without any entry.

2. That the Law so favoureth a Remitter, that if the discontinuee be an Infant, or feme Covert, and Tenant in Tail after a discontinuance disseise them, and dye seised, the issue shall be remitted without any respect of the privilege of Infancy or Coverture, 11 E. 4. 1.

In this case, and many other, the Law that abhorreth Suits

Suits of vexation, doth avoid circuitry of action, for the Rule is *Circuitus est vitandus*, 11 E.3.3. *Ass.* 85. 4 E.g.35. 14 H.6.27. 10 H.7.11. F N B *Mesne* and *Waste*.

*Secd.* 660. *Fo.* 348. b.

Since *Littleton* wrote, and after the Statute of 24 H. 8. c. 10. If Tenant in Tail make a Feoffment in fee to the use of his issue, being within age, and his heirs, and dieth, and the right of the estate Tail descend to the issue, being within age, yet he is not remitted, because the State executeth the possession in such plight, manner and form as the use was limited & sic de similibus, 35 H.8. *Dyer* 54.b. 6 E.6. ib.77. 1 & 2 P.M. 116. 1 & 2 P.M. 129. 191. 28 H.8.23. b. *Pl. Com.* Any *Townshends* Case, 34 H.8. *Remit.* Br.49.

But if the issue in Tail in that case wave the possession, and bring a *Formedon* in the Discend. and recover against the feoffees, he shall thereby be remitted to the estate Tail. otherwise the lands may be so incumbered, as the issue in Tail should be at a great inconvenience: but if no *Formedon* be brought, if that issue dyeth, his issue shall be remitted, because a state in fee simple at the Common Law descendeth unto him, *Pl. Com. supra*.

95 *Nota*, in this case, that the State of the land, out of which the rent issued, being defeated, the rent is defeated also. *Fo.* 349. a.

But if Tenant in tail make a Lease for life, whereby he gaineth a new reversion in fee, so long as Tenant for life liveth, and he granted a rent-charge, out of the reversion, and after Tenant for life dyeth, whereby the grantor becometh Tenant in Tail again, and the reversion in fee defeated, yet because the grantor had a right of the intail in him, clothed with a defeasible fee simple, the rent charge remaineth good against him, but not against his issue, which diversity is observable, 11 H.7.21. *Edriches* case.

If the heir apparent of the disseisee disseise the disseisor, and grant a rent charge, and then the disseisee dieth, the granter shall hold it discharged, for there a new right of entry doth



doth descend unto him, and therefore he is remitted.

So if the Father disseise the grandfather; <sup>and</sup> a grant and rent charge and dyeth, now is the entry of the grandfather taken away, if after the grandfather dyeth, the Sonne is remitted. So as where our authour putteth his example of a fee taile, it holdeth also in case of fee simple, and *Littleton que la terre est discharge del rent, &c.* But the whole grant is not thereby avoided, for the grantee shall have notwithstanding a writ of annuity, and charge the person of the grantor, *Lib. 2. fo. 36.b. Wards case.*

Also *Littleton* here puts his case of things granted out of the Land. But if the issue at full age by Deed Indenture, or Deed Poll make a Lease for years of the land, and after by the death of tenant in tail, he is remitted: It is holden that he shall not avoid the Lease, because it is made of the Land it self; and the Land is become by the Lease in another, <sup>it is</sup> then it is in the case of a grant of a rent charge. 33 H.8. Dy. 51.b. and vide *Señ. 289.\**

*Señ. 661. fo. 349.b.*

Regularly, a man shall not remitted to a right remediless, for the which he can have no action, *l. 3. f. 3. Marquesse of Winchesters case.* Neither an action without a right, nor a right without an action, can make a remittance. As if Tenant in tail suffer a common recovery, in which there is error, and after Tenant in tail disseise the recoveror, and dyeth, here the issue in tail hath an action, *wiz.* a writ of error, but as long as the Recovery remaineth in force, he hath no right, and therefore in that case there is no remittance. If B. purchase an Advowson, and suffer an usurpation and six moneths to passe, and after the usurper grant the Advowson to B. and his heirs, B. dieth, his heir is not remitted, because his right to the Advowson was remediless, a right without an action. Tenant in tail of a Manor whereunto an Advowson is appendant maketh a discontinuance, the discontinuance grants the Advowson to Tenant in tail and his heirs, Tenant in tail dyeth, the issue is not remitted to the Advowson

vowson, because the issue had no action to recover the Advowson, before he recovered the Manour, whereunto the Advowson was Appendant, 5 H.7.35. And so it is of all other inheritance, regardant, appendant, or appurtenant, a man shall be remitted to any of them before he recontinueth the Manor, &c. whereunto they are regardant, appendant, &c.

*Car nul ne poit clamer droit en les appurtenances ne en les accesories que nul droit ad en le principall, Brit. fo. 126.*

But on the other side, if a man be remitted to the principal, he shall also be remitted to the appendant or accessory, albeit it were severed by the discontinuee, or other wrong doer; and therefore if Tenant in tail be of a Manor, whereunto an Advowson is appendant, and infeoffeth A, of the Manor with the appurtenances, A. re-enfeoffeth the Tenant in tail, saving to himself the Advowson, Tenant in tail dieth, his issue being remitted to the Manor, is consequently remitted to the Advowson, although at that time it was severed from the Manor. So it is in the same case, if Tenant in tail had been disseised, and the disseisor suffer an usurpation, if the disseisee enter into the Manor, he is also remitted to the Advowson, 8 R.2. *Qu. imp.* 199. 2 H.4.18. 14 H.6.15, 16. FNB.25. b. 36. f. 33 H.8. Dy. 48. b. 24 E.3. discontinuance, 16.

*Señ. 663, 664. Fo. 350.*

If the discontinuee, after the death of Tenant in tail make a charter of feoffment to the issue in tail being within age who hath right, and to a stranger in fee, and make livery to the infant, in name of both: the issue is not remitted to the whole, but to the half, for first he taketh the fee-simple; and after the remittance is wrought by operation of Law, and therefore can remit him, but to a moiety. *Vide Señ. 288.*

*Si Tenant in tale infeoffe son heire apparent, l'heire evant de plein age al temps de feoffment, & puis le Tenant en taile mor, ceo nest remitter al heire, pur ceo que il suit sa folly, que il evant de plein age voile prender tiel feoffment, &c.* By this feoffment albeit the heir apparent hath some benefit in the life of his

Ancestor, yet if he thereby ( besides his own ) subject during his life, to all charges and incumbrances made or suffered by his Ancestors, 40.E.3.44. 18.E.4.25.

*Sett.665. Fo. 351.a.*

*Nota*, that the estate which doth in this case work the Remitter, could not have continuance after the decease of the wife; and so on the other side, if the husband make a discontinuance, and take back an estate to him and his wife, during the life of the husband, this is a Remitter to the wife presently, albeit the estate is not by the limitation to have continued after the decease of the husband; which case is proved by the reason of the case, which our Author here putteth.¶

If a man take to wife a woman seised in fee, he gaineth by the intermarriage, an estate of freehold in her right, which estate is sufficient to work a Remitter, and yet the estate which the husband gaineth depending upon uncertainty, and consisteth in privity. 13.H.4.6.18.E.4.5.11.H.7.19.10.H.6.11.7.H.6.9.b.

For if the wife be attainted of felony, the Lord by escheat shall enter, and put out the husband, otherwise it is if the Felony be committed after issue had, 4.Aff.p.4.4.E.3.Aff.166. vide S.58.

Also if the husband be attainted of felony, the King gaineth no freehold, but a perpancy of the profits, during the Coverture, and the freehold remaineth in the wife.

2. If she were possessed of a terme for years, yet he is possessed in her right, but he hath power to dispose thereof by grant or demise, and if he be outlawed or attainted, they are gifts in Law. Pl.Cam.260.b. Dame Hales case.50.Aff.5.21.E.4.35.7.E.4.6.7.H.7.2.

Upon an execution against the husband for his debt, the Sheriffe may sell the terme during her life; but the husband can make no disposition thereof by his last Will. Also if he make no disposition or forfeiture of it in his life, yet it is a gift in Law unto him, if he do survive his wife, but if hee make no disposition, and die before his wife, she shall have

it again; and the same Law is of Estates by Statute Merch. Stap. Eleg. and other Chattels realls in possession. 1.8. fol.96. *Matthew Mannings case.*

But if the husband charge the Chattrell reall of his wife, it shall not bind the wife, if she survive him. 7.H.6 1.

If a feme sole be possessed of a Chattell reall, and be there- of dispossessed, and then taketh husband, and the wife dieth, and the husband surviveth, this right is not given to the husband by the intermarriage, but the Executor or Administrator of the wife shall have it; so it is if the wife hath but a possibility. *vide Sect. 58.*

And so it is if the wife be possessed of Chattell realls in *auter droit*, as Executor, or Administrator, or as Guardein in Socage, &c. *Pl. Com. 294. Osbornes case, and fo. 192. b. Wrotesleyes Case.*

In the same manner if a woman grant a term to her own use, taketh husband and dieth, the surviving husband shall not have this trust, but the Executors or Administrators of the wife, for it consisteth in privity, *P. 22. El. in Cancell. Withams case.*

Chattels realls consisting meerly in action, the husband shall not have by the intermarriage, vnless he recover them in the life of the wife, albeit he survive the wife, as a Writ of Right of Ward, a *valore maritagij*, a forfeiture of Marriage, &c, whereunto the wife was intituled before the Marriage.

But Chattels realls being of a mixt nature, *viz.* partly in possession, partly in action, which happen during the Coverture, the husband shall have by the intermarriage, &c. As if the husband be seised of a rent-service, charge, or seck, in the right of his wife, the rent become due during the Coverture, the wife dieth, the husband shall have the arrerages, but if the wife survive the husband, she shall have them, and not the executor of the husband, 13 E. 3. *Qu. imp.* 57. 14 H. 4. 12. *F. N. B.* 121. 11 R.2. *Account* 49. 12 R.2- *Breve* 639. 5 E. 3. *Exec.* 99.

So it is of an Advowson, if the Church become void during

ring the Coverture, he may have a *Qu. Imp.* in his own name, as some hold : but the wife shall have it if she survive him, and the husband if he survive her, 50 E. 3. 13. 28 H. 6. 9. 7 H. 7. 2.

Now by the statute of 32 H. 8. cap. 37. if the husband survive the wife, he shall have the arrerages, as well incurred before the marriage, as after, *l. 4. 51. Ognels case. H. 17. El. Rot. 457. in Com. B. Sharps case, f. 351. b.*

But the marriage is an absolute gift of all chattels personals in possession in her own right, whether the husband survive the wife or no ; but if they be in action, as debts by Obligation, Contract, or otherwise, the husband shall not have them, unlesse he and his wife recover them. And of personal goods *en auter droit*, as Executor or administrator, 372 &c. the marriage is no gift of them to the husband, although he survive his wife, 21 E. 4. 4. 11 H. 7. 4. 26 H. 8. 7. 43. E. 3. 10. 4 H. 6. 5. 16 E. 4. 8.

If an estray happen within the Manor of the wife, if the husband dye before seisure, the wife shall have it, for that the property was not in the wife before seisure, 21 E. 3. 8. *vide* 10 H. 6. 11.

But note a diversity between a property in personal goods and a bare possession ; for if personal goods be bailed to a feme, or if the finde goods, or if goods come to her hands as executor to a Bailiff, and taketh a husband, this bare possession is not given to the husband, but the action of detinue must be brought against the husband and wife, 39 E. 3. 17.

*Sect. 666. Fol. 351. b.*

By this case it appeareth, That albeit there be no moieties between husband and wife, yet this is a Remitter presently, and standeth not upon the survivor of the wife, as some have thought ; for if the estate gained by intermarriage be a sufficient estate to work a Remitter, *à fortiori*, an estate made to the husband and wife, shall work a Remitter in the wife. And so it is if Tenant in Tail infeof his issue being

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within

within age, and his wife in fee, and dieth, this is a Remitter to the issue presently, by the death of Tenant in Tail, though some have thought the contrary, 21.E.3.26.29.E.3.43.19.E.3. Remit. 14.35. Aff. 12.26.E.3.69. vide 676 Sess. 11.R.2. Remit 12.44.E.3.17.

Sess. 667. Fol. 352. a.

Estoppel, *ie.* a Conclusion, because a mans own act, or acceptance, stoppeth or closeth up his mouth to alleage or plead the truth. *l. 2. fo. 4. b. Goddards Case.* Vide S. 41. & 693, 695, 679.

Note three kindes of Estoppel :

1. By matter of Record, *viz.* by Letters Patents, Fine, Recovery, Pleading, taking of Continuance, Confession, Imparlance, Warranty of Attorney, Admittance, 43. Aff. 29. 8.H.4 7, 8. 22. Aff. 54. 15.E.3. *Estop.* 239. 4.E.3. *ib.* 133.

2. By matter in writing, as by Deed indented, by making of an Acquittance by Deed indented, or Deed Poll, 4.H.4.1. 8.H.7.6.13.H.7.24. 15.E.4.28.41.E.3. *Estop.* 12. 12.R.2. *Estop.* 212. by Defeasance, by Deed indented, or Deed Poll. 8.R.2. *Estop.* 283. 35. H. 6. 18. 3. H. 6. 16. 16. H.7.5. 34.H.6.19. 14.H.4.29.

3. By matter *in pais*, as by Livery, by Entry, by Acceptance of rent, by Partition, and by acceptance of an estate, as here in the Case that *Littleton* putteth, whereof *Littleton* maketh a speciall Observation, That a man shall be estopped by matter in the Countrey, without any writing.

Note these few Rules concerning Estoppels :

*Quere* (1) 1. That every Estoppel ought to be reciprocal, *i. e.* to binde both parties; and this is the reason, that regularly a stranger shall neither take advantage, nor be bound by the Estoppel, 33 H. 6. 19. 50. 30 H. 6 2. 31 E. 3. Estoppel 240. 33. Aff. 18. 30. Aff. 51. 14. Aff. 9. 18. E. 4. 1. Privies in blood as the heir; privies in estate, as the feoffee, lessee, &c. privies in Law, as the Lords by escheat; Tenant by the Curtesie, Tenant in Dower, the Incumbent of a Benefice, and others that come under by act in Law, or in the post, shall be bound

bound and take advantage of Estoppels, and that a Rebutter is a kinde of Estoppel, 8 Aff. 53. Br. Fines 73. 8 H. 617. 21 E. 3. 35. 38. E. 331. 20 E. 3 Estop. 187.

2. That every Estoppel, because it concludeth a man to alleage the truth, must be ertain to every intent, and not to be taken by argument or inference, 21 E. 4. 4. 23. Aff. 14. 17 H. 6. Estop. 273. 18 E. 3. 30. 7 H. 6. 7. & 16. (2)

3. Every Estoppel, ought to be a precise Affirmation of that which maketh the Estoppel, and not be spoken impersonally, as if it be said, *Ut dicitur, quia impersonalitas non concludit, nec ligat*, 46. 3 E 33. 29 Affe. 38. Pl. Com. 398. neither doth a recital conclude, because it is no direct Affirmation 35. H. 6. 33. 46. 3 E 12 49 E. 3. 14. 8. Aff. 3. 45. Aff. 5. 3. El. Dyer 196. 11 El. Dyer 280. 9 H. 6. 60. (3)

4. A matter alleaged that is neither traversable nor material, shall not estop, 5 E. 4. 7. 8 E. 4. 19. 10 E. 4. 12. 22 E. 4. 38. 32 Aff. 9. 35 H. 6. 20. (4)

5. Regularly a man shall not be concluded, by acceptance or the like, before his Title accrued, 33 H. 6. 16. 4 E. 3. 22. 6 H. 4. 7. 31 E. 1. Gard 155. F. N. B. 142. E. (5)

6. Estoppel against Estoppel doth put the matter at large, 12 H. 7. 4. 20 H. 6. 29. 3 H. 4. 9. 41 E. 3. 4 11 H. 4. 30. (6)

7. Matters alleaged by way of supposal in Counts, shall not conclude after Non-suit: otherwise it is after Judgment given; and after Non-sute, albeit the supposal in the Count shall not conclude, yet the Barre, Tittle, Replication, or other pleading of either party, which is precisely alleaged, shall conclude after Non-suit; and hereby are the Books reconciled, 2 R. 3. 14. 2 R. 2. Estop. 10. 40 E. 3. 21. 128. 4. 13. 18 E 3. 31. 35. 44 E. 3. 45. 17 Aff. 27. 45 E 3. 2. 21 H. 7. 14. 5 E. 4. 7. 1 E. 4. 19. 3 E. 4. 11. 4 E 3. 54. 7 E. 6. Br. Fstop. 162. 11. H. 4. 30. 30 E. 3. 21. 31 Aff. 14. (7)

8. Where the verity is apparent in the same Record, the adverse party shall not be estopped to take advantage of the truth, for he cannot be estopped to alleage the truth, when the truth, appeareth of Record, If a Fine be (8)



be levied without any Original, it is voidable, but not void; but if an Original be brought, and a Retraxit entred, and after that a concord is made, or a Fine levied, this is void in respect the verietie appeareth of Record, 37 Aff. 17. 38 H 12. 3 *El. Dyer* 222.

An Impropriation is made after the death of an Incumbent to a Bishop and his Successors; the Bishop by Indenture demiseth the Personage for fourty yeers, to begin after the death of the Incumbent, the Dean and Chapter confirm it, the Incumbent dyeth, this demise shall not conclude, for that it appeareth he had nothing in the Impropriation, till after the death of the Incumbent, 7 *Eliz. Dye* 244.

9. Where the Record of the Estoppel doth run to the disability, or illegittimation of the person, there all strangers shall take benefit of the Record, as Outlawry, excommunication, Profession, Attainder of *Præmunire*, of Felonies, &c. Bastardy, Mulierty, and shall conclude the party, though they be strangers to the Record, *Vide Sect. 196. 197, &c.*

But of a Record concerning the name of the person, quality or addition, no stranger shall take advantage, because he shall not be bound by it.

But *Nota*, Reader, That in case of the Mulierty *prima facie*, an estranger shall take benefit of it, &c. But yet because he may be a Mulier by the Ecclesiastical Law, and a Bastard by the Common Law, therefore against such a Certificate pleaded, the adverse party may alleage the special matter, and confesse the Certificate of the Bishop, according to the Ecclesiastical Law, and alleage further the special matter according to the Common Law, whereunto the adverse party must answer, and so are the Books reconciled, *Bract. fo. 420. 26 Aff. 64. 39 Aff. 10. 11 H. 4. 84. 7 H. 6. 7. 33 Aff. 5. 11 E. 3. Estop. 2 29. 21 E. 3. 39. 19 R. 2. Estop. 28. 2. 3 E. 23. 3. ib. 33 E. 3 Estop. Statham. Stat. 9 H. 6. c. 11. 30 H. 6. 2. D. & St. 69. 34 H. 6. 39. 18 E. 4. 2 b, 10 E. 4. 16.]*

*Señ. 669. Fol. 353.a.*

When a feme covert is received, she shall plead, as if she were sole; and this is regularly true, yet holdeth not in all cases: for if a feme covert be received in an Affize, and plead a Record and fail, therefore she shall not be adjudged a disseisor, as she should be if she were sole, &c. 37 Aff. 1.

So if a feme covert onely levy a Fine executory, and a scire fac. is brought against her and her husband, if she be received upon the default of her husband, she shall barre the Conufee, which if she had been sole she could not do and in some other cases, 17 Aff. 17. 29 E. 3. 43. 5 E. 3. 138 *Voucher*.

Again, If the husband levy a Fine of his wives land, and the Conufee grant and render, the land to the husband and wife, although the wife be not party to the Original, nor to the Conufans, and therefore she ought not by the Law to take any present estate, but by way of remainder onely: yet here it is proved by *Littleton*, That the grant and render *de feſſo* to the wife *in presenti*, is not void, for then it could not work a Remitter, but voidable by Writ of Error, and that avoidable estate doth work a Remitter, *T. 27 El. inter Owen & Morgan, Rot. 276. in Com. B. l. 3. f. 5. Marg. of Winchesters Case, 7 E. 3. 64. 13 E. 3. Vouch. 119. Vide Señ.*

*Señ. 670. Fo. 353.b.*

*Si Baron & feme fefont un conufance de droit a un auter, &c. ou fefoyent un grant & render a un auter, ou releafe per fine a un auter &c. lou le droit del feme paſſera del feme per forne de mas le fine, en tout tiels cafes, le feme ſerre examin devant que le fine ſoit accept, pur ceo que tiels fines concludont tiels femes coverte a tous jours, &c. mes lou riens eſt move en le fine forſque tantſolement, que le Baron & la feme pregnant eſtate per force de mes le fine, ceo ne concludam la feme, pur ceo que en tiel caſe, el jameres ne ſerre my examine, &c. 15 E. 4. 28. 14 E. 3. 31.*

Therefore if the husband and wife be Tenants in ſpeciall Tail, and they levy a Fine at the Common Law, and after the

the husband wife take back an estate to them and their heirs in this case the estate Tail is not barred; and yet against a feme levied by her self, she cannot be remitted, because thereupon she was examined; but in that case if the land descend to her issue, he shall be remitted, 29 E. 3. 43. 43 E. 3. 5.

*Señ. 671.*

Note a diversity between a Remitter and a Discent: For if a woman be disseised, and being of full age taketh husband, and then the disseisor dyeth seised, this discent shall binde the wife, albeit she was covert when the discent was cast, because she was of full age when she took husband. But albeit the wife that hath an ancient Right, and being of full age, taketh a husband, and the Discontinue letteth the land to the husband and wife for their lives, this is a Remitter to the wife; for Remitters to ancient Rights are favoured in Law.

*Señ. 672. Fo. 354. a*

Here it appeareth, That the husband against his own alienation, if he had taken the estate to him alone, could not have been remitted: But when the estate is made to the husband and wife, albeit they be but one person in Law, and no moities between them, yet for that the wife cannot be remitted in this case, unlesse the husband be remitted also, and for that Remitters are favored &c. therefore in this case in Judgement of Law, both husband and wife are remitted, which is worthy of great Observation.

*Señ. 673. Fol. 354. b.*

*Littleton* having spoken of Remitters to the issue in Tail, who is privy in blood; and to the wife who is privy in person, now he speaketh of Remitters to them in reversion or remainder expectant upon an estate Tail, who are privy in estate: and this case proveth, That the wife is remitted presently; for the equity of the Law requireth, that as the dis-  
continuance

continuance of the estate in Tail, is a discontinuance of the reversion or remainder, so that the Remitter to the estate Tail, should be a Remitter in the reversion or remainder, 42 E.3. 17 41 Aff. 1. 36 Aff. p. 4.

Tenant for life, the remainder to A. in Tail, the remainder to B. in fee; Tenant for life is disseised, a collateral Ancestor of A. releaseth with Warranty, and dieth, whereby the estate Tail is barred, the Tenant for life re-enters, the disseisor hath an estate in fee simple, determinable upon the estate Tail, and the remainder of B. is revested in him. And so note in this case, the estate for life, and the remainder in fee, are revested and remitted, and an estate of inheritance left in the disseisor, 44 Aff. p. 15. 44. E. 3. 30.

If a Fine be levied *sur grant & rend.* to one for life, or in taile, the remainder in Fee, if Tenant for life, or in taile execute the estate for life, or in taile, this is an execution of the Remainder. 20. E. 3. Aid. 29.

A gift in tail is made to B. the remainder to C. in Fee, B. discontinueth and taketh back an estate in tail: the remainder in Fee to the King by Deed inrolled, Tenant in taile dyeth, his issue is remitted, and consequently the remainder as *Littleton* here saith, and the diversity is between an Act in Law, for that may devest an estate out of the King, and a tortious Act, or entry, or a false and a fained recovery against Tenant for life, or in taile, which shall never devest any Estate, remainder, or reversion out of the King. *Pl. Com.* 489. *Nichols* case, and 553. *Walsingham* case, 17. *El. Dy.* 344. 25. E. 3. 48. *Resceit* 18. 49 E. 3. 16. *Surre Staffords* case. l. 8. fo. 76. b.

But a Recovery by good Title against Tenant for life, or in taile, where the remainder is to the King by defeasable Title shall devest the remainder out of the King, and restore and remit the right owners. *Chohnleyes* case. l. 2. 53. 7 R. 2. Aid le 10y. 61. 22. E. 3. 7.

*Señ.* 674. 675, *Fo.* 355.

*Quod ei desorceat*, is a writ that is given by the statute of *W.* 2. ca. 4. to any Tenant for life, or in Taile upon a Recovery by default

default against them in a *Precipe*, and lyeth against the Recoveror and his heirs; in which case the particular Tenant was without remedy at the common Law, because he could not have a writ of right. There hath been a question in our Books upon these words by default, &c. And some do hold contrary to three Objections made, &c. and as to the first they say, That albeit that in the writ of waste, judgement is not only given upon the default, yet the default is the principal, and the cause of awarding of the writ, to enquire of the waste is an incident thereunto: and the Law alwayes hath respect to the first and principal cause, and therefore upon such a Recovery, a writ of deceit lieth, and that writ lyeth not but where the recovery is by default. 17 E. 3. 58. 29 E. 3. 42. F. N. B. 98. b. 12 H. 4. 4. 19 E. 2. disceit 56. w. 2 ca. 3. 3 H. 4. 1.

So in an action of waste against the Husband and wife, upon the default of the Husband the wife shall be received, and yet the Statute there speaketh also *per defaultam*. So upon such a recovery in waste against the Baron and feme by default, the wife shall have a *cui in vita* by the Statute, and it speaketh where the recovery is *per default*. 9 E. 4. 16. and albeit the defendant may give in evidence, if he knoweth it, yet when he makes default, the Law presumeth he knoweth not of it, and it may be that he in truth knew not of it; and therefore it is reason, that seeing the statute, that is a beneficial Statute hath given it him, that he be admitted to his *quod ei deforcean*, in which writ the truth and right shall be tried; and so it is of a Recovery by default in an Ass. albeit the Recognitor of the Ass. give a verdict, a *Quod ei deforcean* lyeth; and all this was resolved by the whole Court of Common Pleas, and so the doubt in 41 E. 3. 8. well resolved. 2 H. 4. 2. 21 H. 6. 56. 44 E. 3. 42. Br. *quod ei deforcean* 4 P. 33 *Elix Rot.* 1125. inter *Ed. Elmer*, and *William Thacker* in *quod ei deforcean*.

*Nota*, If Tenant for life make default after *defaltation*, and he in Reversion is received and pleading to issue, and it found by verdict for the demandant: the default and the verdict are causes of the judgement, and yet the Tenant shall have a *quod ei deforcean*. As

As to the 2. *Ob.* That the defendant may have an attaint, 1. It was utterly denyed, that an Attaint did lie in this case, for though it be taken by the oath of 12 men, yet it is but an Enquest of Office, where upon no Attaint did lye on either party, us upon an enquiry of Collusion, although it be by one Jury, nor upon a verdict in a *quale jus*.

2. Admitting that an Attaint did lye in that case, yet it followeth *ex conseq* that a *quod ei deforceat* did not lye, 33 E. 3. *quod ei deforceat pl. ult.* F.N.B. 156. *Fleta l 5 ca-11.* 48. E. 3. 19. 40. *Aff.* 23. 33 H. 6. 25. 39 H. 6. 1. F.N.B. 107.

For if an *Aff.* be taken by default, a *quod ei deforceat* doth lye, and yet the party may have an Attaint, for this is no enquest of Office, but a Recognition by the Recognitors of an *Aff.* who were returned the first day, and not returned upon the awarding of the *Aff.* by default. 17 E. 2 Attaint 69. 21 H. 6. 56. 34. H. 6. 12.

As to the 3. *Ob.* That the damages should be the principal, because they were at the common Law, that is an Argument that they are more ancient, but not that they are more principal, and treble dammages were not at the common Law (for the common Law never giveth more dammage than the losse amounteth unto) but are given by the Statute of *Glocester*, but the place wasted is worthier being in the realty, then dammages that be in the personalty, *Et omne majus dignum, trahit ad se minus dignum, quamvis minus dignum sit antiquius, & à digniori fieri debet denominatio*; and it is confessed, That in an action of waste, against Tenant for life, or for years, the place wasted is the principal, because the statute of *Glocester* doth give the place wasted and treble dammages at one time, for no prohibition or action of waste, lay against them at the Common Law, and in an action of waste. 34 H. 6. 7. waste 50.

And in an action of waste, if the defendant confesse the action, the plaintiffe may have judgement for the place wasted, and release the damages which proveth that the damgas are not the principal, for a man shall never release the principle, and have judgement of the Accessory, and an action

on of waste against Tenant for life, is as reall, as an action against Tenant in Dower; and as to the case of 9 H. 5. It was answered, that it was an action in the Tenuit, which is only in the personalty, and then the release of one doth barre both, neither could summons and severance lye in that case, but in an action of wast (in the Tenet) either against Tenant for life, or yeers, the release of the one doth not bar the other, and in those two cases, Summons and severance doth lye- 6 E.3,47.48. E. 3 19.

But when these 3. parts were resolved by the Court for the demandant, then the counsel of the Tenant moved in arrest of judgement another point, viz. That the judgement was given upon a *nihil dicit*, which is alwayes after appearance, and not *per defaultam*, and there upon judgement was stayed.

But to return to Littleton. Here he openeth a secret of Law, for the cause of this Remitter is, for that the Tenant for life in this case might have a *quod ei deforceat*. And the Tenant for life at the common Law was remediless, because he could not have a writ of right, and consequently the feme Covert in this case could not be remitted by the taking of an estate to her husband, and her, because her right was remediless, and could have no action, But when an act of Parliament, or a custome doth alter the reason, &c. thereby the Common Law it self is alterd, if the Act of Parliament and custome be pursued, for *Alterata causa & ratione legis, alteratur & lex. & cessante causa & ratione leg. cessat & lex.* as in this case, the statute of W. 2. giving remedy to this feme Tenant for life, in this case it giveth her ability to be remitted, &c. 14 H. 7 11. per Fineux 27 H.8.4.6. Aid. 35 H. 6. gard 72.29 E. 3. per wilbie, custome. l.3. fo.86. Justice Windhams cases,

And Littleton warily puteth his case, That the Recovery was had against the feme, while she was sole, for there was a time when it was a question, whether a Recovery being had by default against the husband and wife (the wife being Tenant for life) the said statute gave a *quod ei deforceat* to the Husband and wife, for that the statute gave it against Tenant in Dower, and Tenant for life, &c. and here the Husband is not



not Tenant for life, but seised in the right of his wife, and therefore out of the statute; and of this opinion is one book, \* But *Apices juris non sunt jura, & parum differunt quæ re concordant* ) \* 4.E.3.38.33.E.3. *Avowry* 255.

The contrary hath been adjudged, and so that point is now in peace. 5.E.3.4.33.E.3.255.F.N.B.156.a.5.E.3.5.2.E.4.13.F.N.B.156.c.33.H.6.46.2.E.4.11.19.E.4.2.

And the like in case of Resceit for him in reversion. But if the husband lose by default, and the husband die, the wife shall not have a *quod ei deforcat*, for a *cui in vita* is given to her in that case by a former statute, viz. *W. 2.ca.3.*

These things are worthy of due observation, &c. and Littleton in our books of another kinde of *quod ei deforcat* at the common Law upon a disseisin. *Fo. 356.a.*

When the reversion is devested, the lessor cannot have an action of waste, because the Writ is, That the Lessee did waste *ad exheredationem* of the Lessor, and that inheritance must continue at the time of the action brought.

And *Nota*, That in an action of waste brought by the lessor against the lessee, the Lessee in respect of the privity cannot plead generall \* *riens en le reversion*. But he must shew how and by what means the reversion is devested out of him: and this holdeth between the lessor and lessee; but if the grantee of a reversion bring an action of waste, the lessee may plead generally, That he hath nothing in the reversion. 45.E.3.21.44.E.3.34.35.F.N.B.60.23.H.8.waste.Br.138.\* 46.E.3.20.8.H.6.13 30.H.16.7.

And yet in some speciall cases an action of waste shall lie, albeit the lessor had nothing in the reversion at the time of the waste done. As if Tenant for life make a feoffment in Fee upon condition, and waste is done, and after the lessee reenter for the condition broken, in this case the lessor shall have an action of waste. And so if a Bishop make a lease for life or yeers, and the Bishop die, the lessee, the Sea being void doth waste, the successor shall have an action of waste. So if Lessee for life be disseised, and waste is done, the lessee reenter, an action of waste shall be maintained against the lessee, and so in like cases. Here

Here note, that albeit the action be false and feigned, yet is the recovery so much respected in Law, as it worketh a discontinuance. But if Tenant for life suffer a common recovery, or any other recovery by covin and consent between the Tenant for life and the recoverer, this is a forfeiture of his estate, and he in the reversion may enter, &c. 5. Aff. p. 3. 5 E. 3. enter cong. 42. 15 E. 3. Age 95. 41 E. 3. 18. *pe Finchden* 22 E. 3. 2 b lib. 1. 15. Sir William Pelhams case.

Since our Author wrote, the statute of 14. *El. cap. 8.* hath been made concerning this matter : *Vide l. 3. 60. Lib. 1. fo. 15.*

And *Nota*, That although the discontinuance groweth by matter of Record, yet the Remitter may be brought by matter in *pais*.

*Sess. 676. Autor. al. Contr. 44 E. 3. 17. 44 Aff. 2. 43 Aff. 3. Vide Sess. 665.*

*Sess. 677. Fo: 356. b.*

In this case the estate, is in the feme covert presently by the livery before any agreement by the husband, 15. 4. 1. b. 7 H. 6. 17. 1 H. 7. 12. b. 39 E. 3. 30. 57 H. 8. 24.

If the wife survive her husband she cannot claim in by the purchase made during the coverture, but the law adjudgeth her in her better right. 41 E. 3. 18.

But if both estates be waivable, there albeit the wife *prima facie* is remitted, yet after the decease of her husband, she may elect which of the Estates she will. As if lands be given to the husband and wife, and their heirs, the husband make a feoffment in Fee, \* the Feoffee giveth the husband and wife, and the heirs of their two bodies, the husband dieth. 18 *El. Dy.* 351. \* the Feoffee giveth land to the husband and wife, & *for parties to elect begin at her husband's death*

If Lands be given to a man, and the heirs females of his body, and he maketh a feoffment in fee, and take back an estate to him and his heirs, and dyeth having issue a daughter leaving his wife grossement enseint with a Son, and dieth

eth, the daughter is remitted, and albeit the son be afterward borne, he shall not devest the Remitter.

*Señ. 678. Fol. 357.*

Covin and consent in many cases to do a wrong, do choak a meer right, and the ill manner doth make a good matter unlawfull, 18 E.4.2. b.

*Covina*, is a secret assent determined in the hearts of two or more, to the defrauding and prejudice of another, *Pl. Com.* 546. *Wimb.*

If a Disseisor, Intrudor, or Abator do endow a woman that hath lawful Title of Dower, this is good, and shall binde him that right hath, if there were no covin or consent before the disseisin, &c. 44 E.3.46. 11 H.4.60. 44 Aff.29. 19 H.8.12. 18 H.8.5. 11 E.4.2.7 H.7.11.

In all cases where a man hath a rightfull and just cause of action, yet if he of covin and consent do raise up a Tenant by wrong, against whom he may recover, the covin doth suffocate the right, so as the recovery though it be upon a good Title shall not binde; or restore the Demandant to his right, 41 Aff. p. 28. 25 Aff. p. 1. 27 Aff. 74. 15 E.4.4.a. 12. Aff. p. 10.

If Tenant in Tail and his issue disseise the discontinuee to the use of the Father, and the Father dieth, and the land descend to the issue, he is not remitted against the discontinuee, in respect he was privy and party to the wrong, but in respect of all others he is remitted, and shall deraign the first Warranty, 11 E.4.2. 15 E.4.23. 14 H.8.12. 33 H.6.5. 12 E.4.21. b.

A. and B. joyntenants be intituled to a real action, against the heir of the disseisor; A. cause the heir to be disseised, against whom A. and B. recover and sue execution, B is remitted, for that he was not party to the covin, and shall hold in common with A. but A. is not remitted, *fo. 357. b.*

*Nota*, it is regularly true, That a feme covert cannot be a disseisorefs by her commandment or procurement precedent, nor by her assent or agreement subsequent, but by her actual

al entry or proper act she may be a disseisorefs: And therefore some do hold, that *Littleton* must be intended, that the husband and wife were present when the disseisin was done, and others do hold, that *Littleton* is good Law, albeit she were absent, for if that her procurement or agreement be to do a wrong to cause a Remitter unto her in this special case, she shall fail of her end, and remitted she shall not be; but in this special case she shall be holden as a disseisorefs by her coven and consent *quatenus* to hinder a Remitter, F.N.B. 179.g. 12. E.4.9.35 Ass.5.44.E.3.9.23.13 Ass.1. *Temps* E.1. *Wasse* 128.16. Ass.p.7.21.E.4.53.21.H 7.35.3.H.4.17.

*Sett.* 679.

*Vide Pl.Com. Amy Townsends Case, 12.R.2.Remit.12.*

*Sett.* 680, 681. fol.358.

Here note five things: 1. That a remainder expectant upon an estate for life, worketh no Remitter, but when it falls in possession: for before his time he can have no action and no Freehold in him, 18.H.8.3.

2. Though the woman might wave the remainder, yet because she is presently by the death of the husband Tenant to the *præcipe*, it is within the rule of Remitter, and her power of waiver is not material.

3. That a Freehold in Law being cast upon the woman by act of Law, without any thing done or assented to by her, doth Remitter her, albeit she be then sole and of full age, *vide* S. 447.

4. That a *Præcipe* lieth against one that hath but a Freehold in Law.

5. That a woman shall be endowed where the husband hath the inheritance, and but a Freehold in Law, *Br.* 83.b.

*Sett.* 682, 683, 684, 685. Fo.359.

*Vide* 12. E. 4. Compare these four Sections well together.

A man absent can neither take Livery nor make Livery without Deed, *Temps H.8. Feoffments, Br. 7 2. 40 E. 3. 41. 10. E. 4. 1. 4. 15 E. 4. 18. 18 E. 4. 12. 22 H. 6. 12.*

*Verba relata hoc maxime operantur per referentiam, ut in eis inesse videntur. Et le fits nient conusant de ceo ne agrea a le feoffment, &c.* Here it appeareth, That if the Son be Conusant, and agreeth to the Feoffment, &c. This is no remitter to him. *Vide Sess. 682.*

If A. be seised in Tail, and have issue two Sons, and by Deed indented between him of the one part, and the Sons of the other part, maketh a lease to the eldest for life, the remainder to the second in fee, and dieth, and the eldest Son dieth without issue, the second Son is not remitted, because he agreed to the remainder in the life of the Father, or if the like estate had been made by paroll, if in the life of the Father, the Tenant for life had been impleaded, and made default, and he in the remainder had been received, and thereby agreed to the remainder, after the death of the Father, and the eldest Son without issue, the second Son should not be remitted, because he agreed to the remainder in the life of the Father.

*Sess. 685. Fol. 360. a.*

Acts of Parliament are to be so construed, as no man that is innocent, or free from injury or wrong, be by a littrell construction punished, or endammaged: and therefore in this case, albeit the Letter of the Statute is generally to give damage against him that is found Tenant, and the case that *Littleton* here putteth, D. being survivor is consequently found Tenant of the Land: yet because he waived the estate, and never agreed to the Feoffment, nor took any profits, he shall not be charged with the damages.

*Sess. 686, 687. fol. 360. b.*

*Feint (ou fained) action, est tiel action, que comit que les perols de le breve sont voyers, encore per certaine causes home nad cause*

B b

ne

*ne tite per la ley de recover per mesne le action. Et faux action est  
lou les perolls de breve Sont faux.*

*Sect. 687. postea vide.*

As discent do remit the heire which comes in the *Per*, so succession doth remit the successor, albeit he cometh in the *post*; and so in other cases where the issue in taile of full age shall be remitted, there in the like case, shall the successor be remitted also, and all meane charges and incumbrances. *Vide Sect. 150. Stat. Merton.*

*Sect. 688. Fol. 361. a.*

*Si home fust faux action, &c. Et recover envers le Tenant en Taile per default. Littleton addeth (by default) because if the recovery passed upon an issue tried by verdict, he shall never falsifie in the point tried, because an attaint might have been had against the Jurors; and albeit all the Jurors be dead, so as the attaint doe faile, yet the issue in Taile shall not falsifie in the point tried, untill it be lawfully avoided, pro veritate accipitur. As if the Tenant in Taile be impleaded in a Formedon, and he traverse the gift and it tried against him, and thereupon the demandant recover; In this case the issue in Taile shall not falsifie in the point tried, but he may falsifie the recovery by any other matter: as the Tenant in Taile might have pleaded a collaterall warranty, or a release, as Littleton here putteth the case, or to confesse and avoid the point tried; and Littletons case holdeth not only in a Recovery by default, whereof he speaketh, but also upon a *nihil dicit*, or confession, or demurre. 12 E. 4. 19. 13 E. 4. 3. 11 H. 4. 89. 7 H. 4. 17. 14 H. 7. 10, 11. 28. Aff. 32. 52. 34. Aff. 7. 10 H. 6. 5. 19 H. 6. 39. Br. faux Recovery 55.*

*Sect. 689. Fo. 361. b. Vide Sect. 686, 687.*

Here note, That a Remitter may be had after a recovery upon a feint action by a disseisin and a discent, as well as by a discent after a discontinuance by a Feoffment, &c.

*Sect.*

Sect. 690. Fol. 352.a.

Here it appeareth, that if a Judgement be given against a Tenant in Tail, upon a faint or false action, and Tenant in Tail dye before execution, no execution can be sued against the issue in Tail, 10. H. 6. 6. 12. E. 4. 20. 23. *El. Dy. 276. l. 1. f. 106. Shelleys case. Pl. Com. 55. & vide les Autor. supra cited, &c.*

But if in a common recovery Judgement be had against Tenant in Tail, where he vouched and hath Judgement to recover over in value, albeit Tenant in Taile dye before execution, yet the recoveror shall execute the Judgement against the issue in Tail, in respect of the intended recompence, and for that it is the common assurance of the realm, and is well warranted by our Books; and was not invented by Justice Cook, in the time of E. 4 (as some hold by tradition) but it may be that it was, upon former authors and opinions of Judges discovered by him, assented unto by the rest of the Judges. *Vide S. 709. 15. E. 3. Bre. 324 1. E. 4. 5. 5. E. 4. 2. 12. E. 4. 20. 23. El. Dy 376. l. 10. 37. 38. Mary Portingtons case.*

If a recovery be had against Tenant for life without consent or covine, though it be without Title, and execution be had, and Tenant for life dyeth, the reversion or remainder is discontinued, &c. but if such a Recovery be had by covin between the Demandant and Tenant for life, then he in the reversion or remainder may enter for forfeiture. So it is if Tenant for life suffer a common Recovery at this day, it is a forfeiture of his estate. 5. Aff. 3. 5. E. 3. enter cong. 42. lib. 1. 15. 16. *Sir William Pelhams case.*

Since Littleton wrote, there were two Statutes made for preservation of Remainders, and Reversions expectant upon any estate for life, the one in 32 H. 8. the other in 14. El. But 32 H 8. extendeth not to Recoveries, when Tenant for life came in as vouchee, &c. and that Act is repealed by 14 El. and full remedy provided for preservation of the entry of them in reversion or remainder. But the Statute of 14 El. extending not to any recovery, unlesse it be by agreement or Covin, 32 H 8. ca. 31. 14 El. ca. 8.



2. If there be Tenant for life, remainder in Taile, the reversion or remainder in fee, if tenant for life be impleaded by agreement, and he vouching Tenant in Taile, and he vouch over the common vouchee, this shall barre the reversion or remainder in fee, although he in reversion or remainder did never assent to the recovery, because it was not the intent of the Act to extend to such a recovery, in which a Tenant in Taile was vouched; for he hath power by common Recovery, if he were in possession, to cut off all Reversion and Remainders. *L. 3. fo. 60, 61. Lincolne Coll. Case.*

So if Tenant for life had surrendred to him in Remainder in Taile, he might have barred the remainders and reversions expectant upon his Estate.

276. 3. Where the proviso of the Act speaketh of an assent of Record by him in reversion or remainder, it is to be understood, that such assent must appear upon the same Recovery either upon a voucher, Aid prier, Receit, or the like, for it cannot appear of Record, unlesse it be done in course of Law, and not by any extrajudiciall entry, or by *Memorandum*.

*Seft. 691. Fol. 362. a.*

Here it appeareth, That upon the plea of non-tenure, or of a disclaimer of the Tenant in a *Formedon* in the descending, albeit the expresse judgement be, that the Tenant shall goe without day, yet in the judgement of Law, the demandant may enter according to the title of his Writ and be seised in Tail, notwithstanding the discontinuance. *5. E. 4. 1. 36 H. 6. 29. 6 E. 3. 8. 4 E. 4. 38. Bract. l. 5. f. 431. &c. Brit. ca. 84.*

And in this case the demandant hath not two rights, but hath onely one ancient right, and is restored to the same by course of Law, and so Remitter here (in a large sence) is taken for a recontinuance of the right.

Here note, that in such a *præcipe*, where the demandant is to recover damages, if the Tenant plead non-tenure or disclaimer, there the demandant may averre him to be Tenant of the Land, as his Writ supposes for the benefit of his damage,

mage, which otherwise he should lose, or pray judgement and entry. 13 H. 7. 28. 22 H. 6. 44.

But where no damages are recovered, as in a Formedon in discent &c. there he cannot aver him Tenant, but pray his judgement and enter, for thereby he hath the effect of his suit, & frustra fit per plura quod, &c. 8 E. 3. 434. 24 E. 3. 9. 11 H. 4. 16. and 7 H. 6. 17.

A general averment is the conclusion of every plea to the Writ, or in barre of replication, and other pleadings (for Counts or Avowries in nature of Counts need not be averred) containing matter affirmed ought to be averred, & hoc paratus est verificare, &c. Particular averments are, as when the life of Tenant for life, or Tenant in Tail are averred, and there, though this word (*verificare*) be not used, but the matter avouched and affirmed, it is upon the matter an averment, and an averment containeth as well the matter, as the forme thereof.

Sett. 692 Fol. 363. a.

Albeit in this case, and in the case before, the entry of the demandant is his own act, and the demandant hath no expresse judgement to recover, yet he shall be remitted *causa supersa*. 36 H. 6 Fo. 29.

Sett. 693. Fo. 363. b.

Here note a diversity. If a man of full age having but a right of action, taketh an estate to him, he is not remitted, But where he hath a right of entry, and taketh an estate, he by his entry is remitted, because his entry is lawful; and if the disseisor infeoffe the disseisee and others, the disseisee is remitted to the whole, for his entry is lawful: otherwise it is if his entry were taken away. 29. Aff. p. 26. 43. Aff. 3. 11 H. 7. 20. 3 H. 6. 19. 40 E. 3. 43.

If Tenant in Tail be of a manor, where unto an advowson appendant, the Tenant in Tail discontinue in Fee, discontinuee grant away the Advowson in Fee, and dyeth, the Tenant in tail recontinueth the Manor by Recovery, he is there-

by remitted to the Advowson, and he that right hath shall present when the Church becometh void. 8 R. 2. *Qu. imp.* 199. 26. H. 8. 4. F. N. B. 36. & 35. b.

The Patron of a benefice is outlawed, and the Church become void, an estranger usurpeth, and six moneths passe, the King doth recover in a *qu. imp.* and remove the incumbent, &c. Advowson is recontinued to the rightful patron. 22. *Aff.* p. 33. *Theobald Grinvile*; and so note a diversity; a remitter cannot be properly, unlesse there be two Titles, but a recontinuance may be where there is but one.

If the disseisor by Deed Indented make a Lease forlife, or a gift in Taile, &c. yet the Deed Indented shall not suffer the livery made according to the form and effect of the Indenture to work any Remitter to the disseisee, but shall estop the disseisee to claim his former estate: and if the disseisor upon the feoffment, doth reserve any Rent or condition, &c. the rent or condition is good. 13 H. 4. 5. 3 H. 4. 17. 8 H. 4. 8. 12 H. 4. 19. 35. *Aff.* 8. 17. *Aff.* 3. 43. E. 3. 17. *Parkers Case.* 21 H. 6. 2. *per Paston.*

*Sett.* 695. *Fol.* 364. a.

Note a diversity, A claime in *pais* shall not hinder Remitter, otherwise it is a claime of Record, because that doth work a conclusion.

*Sett.* 696. *Fol.* 344. b.

Here note a (notable) diversity: If two joyntenants, or coparceners joyn in a reall action, where their entry is not lawful, and the one is summoned and severed, and the other pursueth and recovereth the moiety, the other Joyntenant or Coparceners, shall enter and take the profits with her, because their remedie was one and the same. But where two Coparceners, and they are disseised, and a discent is cast, and they have issue and dye, if the issue of the one recover her moiety, the other shall not enter with her, because their remedies were severall, and yet when both have recovered, they are coparceners again. 10 H. 6. 10. 19 H. 6. 45. 31 H. 6. *Ent. Cong.* 54.

So here in this case that *Littleton* putteth, then two joyntenants have not equall remedy, for the Infant hath a right of Entry and the other a right of action; and therefore the Infant being remitted to moiety, the other shall not enter and take the profits with her.

If A and B. joyntenants in fee be disseised by the Father of A. who dyeth seised, his Sonne and heir enter, he is remitted to the whole, and his companion shall take Advantage thereof. Otherwise here in the case of *Littleton* for that the Adventure is given to the Infant more in respect of his person, than of his right, whereof his companion shall take no advantage. But if the Grandfather had disseised the Joyntenants, and the land had descended to the Father, and from him to A. and then A. had dyed, the entry of the other should be taken away by the first descent, and therefore he should not enter with the heire of A.

But here in the case of *Littleton*, if after the descent the other Joyntenant had dyed, and the infant survived, some say that he should have entred into the whole, because he is now in Judgement of Law, solely in by first feoffment, and he claimeth not under the descent. *Vide 35 Aff p. ultimo.*

## \*\* CHAP. XIII.

### Of Warranty.

Sec. 697.

*Communi observantia non est recedendum: & minime mandanda sunt quæ certam habuerunt interpretationem.* A warranty is a covenant reall annexed to Lands or Tenements whereby

whereby a man and his heires are bound to warrant the same, and either upon voucher, or by judgement in a writ of *Warrant Carta*, to yeeld other Lands and Tenements to the value of those that shall be evicted by a former title, or else may be used by way of Rebutter i.e. to repel or barre, *Bract.* l. 2. fo. 37. and l. 5. fo. 380. *Co. Glan.* l. 3. ca. 1. 2. 3. 38. *E.* 3 21. 45 *E.* 3. 18. *Fol.* 365. a.

*Garronter en un sens signifie a defender son tenant en sa seisin, & en auter sence signifie que si il ne defendant que le garrant luy soit tenue a eschanges, & de faire son gree a la vaillaunce. Brit. Fo. 197. b.*

By the Statute of *Glocestor*, four things are enacted.

1. That if a Tenant by the Curtesie alien with warranty and dyeth, that this should be no barre to the heir in a Writ of *Mordanc.* without Assets in fee simple; and if Lands or Tenements descend to the heir from the Father, he shall be barred, having regard to the value thereof.

2 That if the heir for want of Assets, &c. doth recover the Lands of his mother by force of this Act, and afterwards Assets descend &c.

3. That the issue of the Sonne shall recover by a Writ of *Cofinage*, *Aiel* and *Besail*; and lastly, that the heire of the wife, after the death of the Father and Mother, shall not be barred of his action to demand the heritage of his Mother by Writ of Entry, which his Father aliened in the time of his Mother, whereof no Fine was levied in the Kings Court. *Fo.* 365. b.

Concerning the 1. There be two points in Law to be observed.

1 Albeit the Statute in this Article name a Writ of *Mordanc.* and after writs of *Cofinage* &c. yet a writ of Right, a *Formedon*, a writ of Entry *ad Com. legem*, and all other like actions are within the purview of this Statute.

\* 2 Where it is said in the said Act (if the Tenant by the Curtesie alien) yet his release with warranty to a disseisor, &c. is within the purview of the Statute, for that it is in equall  
mis-

mischief. 11 E. 2. gar. 83. 4 E. 3. gar. 63. *Pl. Cam.* 110. \* 27 E. 3. 80. 14 E. 4. gar. 5. and 4. *M. Dy.* 148. a.

If Tenant by the Curtesie be of a Seigniory, and the Tenancy escheat unto him, and after he alien with warranty, this shall not binde the issue, unlesse assents descend, for it is in equal mischief, 22. *Aff.* 9. & 37. *temps.* i. e. gar. 86.

Note a diversity between a warranty on the part of the Mother and an estoppel; for an estoppel, &c. shall not binde the heir, when he claimeth from the Father: As if Lands be given to the husband and wife, and to the heires of the husband, the husband make a gift in Tail and dieth, the wife recover in a *Cui in vita* against the donee, supposing that she had fee simple, and make a feoffment and dieth, the donee dyeth without issue, the issue of the husband and wife bring a Formedon in the Reverter against the Feoffee, and notwithstanding he was heir to the Estoppel, and the Mother was Estopped, yet for that he claimed the Land as heir to his father, he was not Estopped. 18 E. 3. 9.

If a feme heire of a disseisor in feoffe me with warranty, and marrieth with the disseisee, if after the disseisee bring a *Præcipe* against me, I shall rebut him in respect of the warranty of his wife, and yet he demandeth the Land in another right; and so if the husband and wife demand the right of the wife, a warranty of the Collateral Ancestor of the husband shall barre 21. R. 2. judgement. 263.

By the Statute of 11 *H. 7. c.* 20. where the woman hath any estate for life of the inheritance, or purchase of her husband, or given to her by any of the Ancestors of the husband, or by any other person seised to the use of her husband, or of any of his Ancestors, there her alienation, release, or confirmation with warranty, shall not binde the heir. *l.* 1. *f.* 176. *l.* 3. 50. 51. 59. 60. 61. 62. *Dy.* 146. 362 *D.* & *St.* 55 *Pl. Com.* 56.

I will only adde two cases, the one was. A man seised of Lands in fee, levied a fine to the use of himself for life, and after to the use of his wife, and of the heirs males of her body by him begotten for her joynture, and had issue male, and

and after he and his wife, levied a fine, and suffered a Common recovery, the husband and wife die, and the issue male enter by force of the said Statute of 11 H.7. and it was holden by the justices of Ass. that the entry, &c. was lawful, and yet this case is out of the letter of the Statute, for she neither levied the Fine, &c. Being sole, or with any other after taken husband, but is by her self with her husband that made the joyniture. *Sed qui habet in littera habet in Cortice*; & this case being in the same mischief, is therefore within the remedy of the Statute, by the intendment of the makers of the same, to avoid the disherison of heirs, who were provided by the said joyniture, and especially by the husband himself, that made the joyniture. *M. 13. Jac. inter. Harley, and West in ejed. fir. in Com.B. Linc.*

The other was, A man is seised of Lands in the right of his wife, and they two levy a Fine, and the Conusee grant, and render the Land to the husband and wife in especial taile, the remainder to the right heirs of the wife, they have issue, the husband dyeth, the wife taketh another husband; and they two levy a Fine in Fee, and the issue enter, this is directly within the Letter of the Statute, and yet is out of the meaning, because the State of the Land moved from the wife, so as it was the purchase of the Husband in Letter, and not in meaning. *P. 17. El. in Com. B. Lattons Case.*

But where the woman is Tenant for life, by the gift or conveyance of any other, her alienation with warranty shall binde the heir at this day. So if a man be Tenant for life (otherwise than as Tenant *per Curtesie*) and alien in fee with warranty and dyeth, this shall at this day binde the heir, that hath the reversion or remainder by the Common Law, not holpen by any Statute. But all this is to be understood, unlesse the heir that hath the reversion or remainder, doth avoid the estate so aliened in the life of the Ancestor, for then the estate being avoided, the warranty being annexed unto the estate is avoided also, *Sec. 725.*

As to the second clause of the Statute of *Glocestor*, there are two points of Law to be observed,

1. That



1. That by the expresse purview of the Statute, if Assets do after descend from the Father, then the Tenant shall have recovery or restitution of the lands of the Mother. But in a Formedon, if at the time of the warranty pleaded, no Assets be descended whereby the Demandant recovereth, if after the Assets descend, there the Tenant shall have a *Sc. fac.* for the Assets, and not for the land intailed; because that if in this case the Tenant should be restored to the land intailed, then if the issue in Tail alienated the Assets, his issue should recover in a Formedon, *Pl. Com.* 110. *a. l.* 8. *f.* 53. *Sims Case.*

2. Note, That after Assets descended, the recovery shall be by writ of Judgement (*viz.* by *Sc. fac.*) which shall issue out of the Roll of the Justices, &c. (to resummon him that ought to warrant, &c.) Also if the Tenant will have benefit of the Statute, he must plead the Warranty, and acknowledge the Title of the Demandant, and pray that the advantage of the Statute may be saved unto him; and then if after Assets descend, the Tenant upon this Record shall have a *sc. fac.* and if Assets descend but for part, he shall have a *scire fac.* for so much, *l.* 8. *fo.* 134. *Mary Shipleys Case.*

But if the Tenant plead the Warranty, and Assets descended, &c. and the Demandant taketh issue that Assets not, &c. which issue is found for the Demandant, whereupon he recovereth, the Tenant albeit Assets do after descend, shall never have a *scire fac.* upon the said Judgement, for that by his false plea he hath lost the benefit of the said Statute. *fol.* 366. *a.*

Touching the third, sufficient hath been spoken before.

For the last, *Nota*, That if the husband be seized of lands in right of his wife, and maketh a Feoffment in fee with Warranty, the wife dyeth, and the husband dyeth, this Warranty shall not binde the heir of the wife without Assets, albeit the husband be not Tenant by the Curtesie, 8 *E.* 2. *gar.* 81. 18. *E.* 3. 51.

A Warranty may not onely be annexed to Freeholds, or Inheritance corporeal, which pass by Livery, as houses and lands,

lands, but also to Freeholds or Inheritances incorporeal, which lie in grant, as Advowsons, and to Rents, Common Estovers, &c. which issue out of Lands or Tenements, and not onely to Inheritances in *esse*, but also to Rents, Commons, &c. newly created. As a man (some say) may grant a Rent, &c. out of land for life in Tail or in fee with Warranty; for although there can be no Title precedent to the Rent, yet there may be a Title precedent to the land, out of which it issueth before the grant of the Rent, which rent may be avoided by the recovery of the land, in which case the grantee may help himself by a *Warrantia Carta*, upon the especial matter, and so a Warranty in Law may extend to a rent &c. newly created; and therefore if a rent newly created be granted in exchange for an acre of land; this exchange is good, and every exchange implyeth a Warranty in Law: and so a Rent newly created may be granted for owelty of partition, 2 H. 4. 13. 30 H. 8. Dyer 42. *Temps E. 1. Admeasurement* 16. 32 E. 1. *Vouch* 294. 30 E. 1. *Exch.* 16. 9 E. 4. 15. 15 E. 4. 9. 29 Aff. 13.

A man seised of a rent seck issuing out of the Manor of D. taketh a wife, the husband releaseth to the Terre-tenant, and Warranteth *Tenementa prædicta*, and dieth, the wife bringeth a Writ of Dower of the rent, the Terre-tenant shall vouch, for that albeit the release enured by way of Extinguishment, yet the Warranty extended to it, and by Warranty of the land, all rents, &c. issuing out of the land, that are suspended or discharged at the time of the Warranty created, are warranted also, *Vide Sect.* 741. 45 E. 3. *Vouch.* 72. 9 E. 3. 78. 18 E. 3. 55. 30 E. 3. 30. 21 H. 7. 9. 3 H. 7. 4. 7 H. 4. 17. 10 E. 4. 9. b. 21 E. 4. 26. 14 H. 8. 6. 30 H. 8. Dyer 42.

*Sect.* 698. *Fo.* 366. b.

A Warranty that commenceth by disseisin is so called, because Regularly the Conveyance wherunto the warranty is annexed doth work a disseisin. The Example that *Littleton* putteth of this kinde of Warranty, have four qualities:

1. That the disseisin is done immediately to the heir that is

is to be bound, *l. 5. fo. 79. Fitzb. c.* and yet if one brother make a gift in Tail to another, and the Uncle disseise the Donee, and infeof another with Warranty, the Uncle dyeth, and the Warranty descend upon the Donee, and then the Donee dyeth without issue, albeit the disseisin was done to the Donee, and not to the Donor, yet the Warranty shall not binde him, *31 E. 3. garr. 28.* The Father, the Son, and a third person are joyn tenants in fee, the Father maketh a Feoffment in fee of the whole with Warranty, and dyeth, the Son dyeth, the third person shall not \* avoid the feoffment \* onely for his own part, but also for the part of the Son, and he shall take advantage that the Warranty commenced by disseisin, though the disseisin was done to another, *fol. 367. a.*

2. That the Warranty and disseisin are *simul*, and *semel*; and yet if a man commit a disseisin of intent to make the feoffment in fee with Warranty, albeit he make the feoffment many years after the disseisin, yet the Law shall adjudge upon the whole matter, and by the intent couple the disseisin and the Warranty together, *19 H. 8. 12. l. 5. fo. 79. b.*

3. That the Warranty, &c (if it should binde) should binde as a collateral Warranty, and therefore commencing by disseisin shall not binde at all. A lessee for years may make a feoffment, and a fee simple shall passe, so as albeit as to the lessor it worketh by disseisin, yet between the parties the Warranty annexed to such estate standeth good upon which the feoffee may vouch the feoffor or his heirs, as by force of a lineal Warranty. Note, there is a feoffment *de jure*, and a \* feoffment *de facto*.

If the Lord be Gardein of the Land, or if the Tenant make a lease to the Lord for years, or if the Lord be Tenant by statute Merchant or Staple, or by Elegit of the Tenancy, and make a feoffment in fee, he hereby doth extinguish his Seignory, although having regard to the lessor it is a disseisin, *Vide Sect. 611. Brit. ca. Disseisin. 50 E. 3. 12. b. 8 H. 7. 5. 19 E. 2. Aff. 400. 3 E. 4. 17. 12 E. 4. 12. 10 E. 4. 18. F. N. B. 201. l. 3. f. 78. Fermors case. \* Temps E. 1. Counterplea de Vouch. 126. 50 E. 3. ibid. 124.*

The

The 4. quality is a disseisin, but that is put for an example. For if the Tenant dyeth, and an Ancestor of the Lord enter before the entry of the Lord, and make a feoffment in fee with Warranty, and dyeth, this Warranty shall not binde the Lord, because it commenceth by wrong, being in nature of an Abatement, & sic de similibus.

Señ. 700. Fol. 367. b.

If the purchase were to the Father and the Son, and the heirs of the Son, and the Father maketh a feoffment in fee with Warranty, if the Son enter in the life of the Father, and the feoffee re-enter, the Father dyeth, the Son shall have an Afsize of the whole, 13 Aff. 8. 13 E. 3. gar. 24. 25. 37. 22 H. 6. 51. 8 H. 7. 6.

But if the Son had not entred in the life of the Father, then for the Fathers moiety, it had been a barre to the Son, for that therein he had an estate for life, and therefore the Warranty as to that moiety had been collateral to the Son, and by disseisin for the Sons moiety, and so a Warranty defeated in part, and stand good in part. —

If a man of full age, and an Infant make a feoffment in fee with Warranty, it is good for the whole against the man of full age, and void against the Infant. For albeit the feoffment of an Infant passing by Livery of seisin be voidable, yet his Warranty which taketh effect onely by Deed, is meerly void, *Temps E. 1. Voucher 207. 39. E. 3. 26. John Londons Case, 14. H. 6.*

Señ. 701. Fo 368. a. b.

*Duo non possunt in solido rem unam possidere, 19. H 6. 28. b. per Newton.*

257. If a man hath issue two daughters, Bastard eign and Mulier puisne, and dye seised, and they both enter generally, the sole possession shall not be adjudged onely in the Mulier, because they both claim by one and the same Title, 17. E. 3. 59. 11. Aff. p. 23.

Barrettor,

*Barretor*, is a common mover, and exciter, or maintainer of suits, quarrels, or parts, either in Courts, or elsewhere in the Countrey, *l. 8. f. 36. b. Case de Barretty. fo. 368. b.*

Extortion in his proper sense is a great misprision, by wresting, or unlawfully taking by any Officer, by colour of his Office, any money or thing valuable, of, or from any man, *qd, non est debitum, vel quod est ultra debitum, vel ante tempus quod est debitum*, *Pl. Com. 64. l. 10. 10. 1. Beaufages Case, . W. 1. c. 26. &c. W. 1. c. 10. 42 E. 3. 5. 27. Aff. 14. Pl. Com. 68.*

Robbery is apparant, and hath the face of a Crime: but Extortion puts on the visage of Vertue, for expedition of Justice, &c. and it is ever accompanied with that grievous sin of Perjury, *Pl. Com. Dive and Mannings Case*. But largely, Extortion is taken for any Oppression by extort power, or by colour or pretence of Right; and so *Littleton* taketh it in this place, *7 E. 4. 21.*

*Manutenentia*, signifies a taking in hand, bearing up, or upholding of quarrels and sides, to the disturbance or hinderance of Common Right, *1 E. 3. c. 14 20 E. 3. c. 4, 5.*

By the Statute of *1 R. 2 c. 9.* it is enacted, That feoffments made for maintenance, shall ~~not~~ be holden for none, and of no value, so as *Littleton* putteth his case at the Common Law; for he seemeth to allow the feoffment, where he saith *tiel feoffment fuit le cause, &c.*

But some have said, That the feoffment is not void between the feoffer and the feoffee, but to him that right hath.

Now since *Littleton* wrote, there is a notable Statute *32 H. 8. c. 9.* made in suppression of the causes of unlawfull maintenance, The effect of which Statute is:

1. That no person shall bargain, buy, sell, or obtain any pretended Rights or Titles.

2. Or take, promise, grant, or Covenant to have any Right or Title of any person, in, or to any lands, &c. but if such person which so shall bargain, &c. their Ancestors, or they by whom he or they claim the same, have been in possession of the same, or of the reversion, or remainder thereof, or taken

taken the \* rents or profits thereof by the space of one whole year, &c. upon pain to forfeit the whole value of the lands, &c. and the buyer or taker, &c. knowing the same, to forfeit also the value. \* Those words are but explanatory, and put for example, &c.

3. Provided that it shall be lawfull for any person being in lawfull possession, &c. to obtain or get the pretended Right or Title, &c.

Nota, That Title or Right may be pretended two manner of wayes :

1. When it is meerly in pretence or supposition, and nothing in verity.

2. When it is a good Right or Title in verity, and made pretended by the act of the party, and both these are within the said Statute: For example ;

If A. be lawfull owner of land, and is in possession, B. that hath no right thereunto grant to A or contracteth for the land with another, the grantor and the grantee ( albeit the grant be meerly void ) are within the danger of the Statute, for B. hath no right at all but onely in pretence.

If A. be disseised in this case, A. hath a good lawfull right, yet if A. being out of possession, grant to, or contracteth for the land with another, he hath made now his good right of Entry pretended within the Statute, and both the grantor and the grantee within the danger thereof, *A fortiori* of a right of Action, *quod nota. Pl. Com. 80, &c. Partridges Case.*

It is further to be known, That a Right or Title may be considered three manner of wayes :

1. As it is naked and without possession.

2. When the absolute Right cometh by release or otherwise to a wrongfull possession, and no third person hath either *jus proprietatis*, or *jus possessionis*.

3. When he hath a good right and a wrongfull possession. As to the first somewhat hath been said. As to the second, taking the former example, If A. be disseised, and the disseisee release unto him, he may presently sell, grant or contract

tract for the land, and need not tarry a yeer; for it is a rule upon this Statute, that whosoever hath the absolute ownership of any Land, tenements, or hereditaments (as in this case the disseisor hath) there such owner may at his pleasure bargain, grant, or contract for the land; for no person can thereby be prejudiced, or grieved. 6 E. 6. Br. Maintenance 38.

And so if a man Mortgage his Land, and after redeem the same, or if a man recover land upon a former title, or be remitted to an ancient right, he may at any time bargain, &c.

As to the third, if in the case aforesaid, the disseisor dyeth seised, and A. the disseisee enter, and disseise the heir of the disseisor, albeit he hath an ancient right, yet seeing the possession is unlawfull, if he bargain or contract for the land before he hath been in possession, by the space of a yeer, he is within the danger of the Statute; because the heir of the disseisor hath right to the possession; and he is thereby grieved, & sic de similibus.

A Lease for yeers is within the Statute, for the Statute saith not (the right but any right) and the offendor shall forfeit the whole value of the Land. 23. Eliz. Dy. 374. Pl. Com. Fo. 87.

But yet, if a man make a Lease for yeers to another, to the intent to try the Title in an *Eject. fir.* that is out of the statute, because it is in a kind of course of Law, but if it be made to a great man, or any other to sway or countenance the cause, that is within this statute. M. 30. and 31. El. 28. 11. inter Finch and Cocham in Com. Banc. Fo. 369. b.

A Customary right, or a pretence thereof to lands holden by Copie is within this statute. l. 4. fo. 26. Copibold case.

If there be Tenant for life, the remainder in fee by lawfull and just title, he in the remainder may obtain and get the pretended right, or title of any stranger, not onely for that the particular estate, and the remainder are all one, but for that it is a mean to extinguish the seeds of troubles and suits, and cannot be to the prejudice of any. 34 H. 8. Dy. 52.

And where the Statute saith (being in lawfull possession, by taking the yeerly rent, &c. those words are but explanation)



tory, and put for example: for howsoever he be lawfully seised in possession, reversion, or remainder, it sufficeth, though he never took profit. But the matter observable upon this proviso, is, that if a disseisor make a Lease for lives, or yeers, the remainder for life, in taile, or in fee, he in remainder cannot take a promise, or Covenant, that when the disseisee hath entered upon the Land, or recovered the same, that then he should convey the Land to any of them in remainder thereby to avoid the particular estate, or the interest or estate of any other; for the words of the proviso be (buy, obtain, get or have by any reasonable way or mean) and that is not by promise or Covenant, to convey the Land, after entry, or recovery, for that is neither lawfull, being against the expresse purview of the body of the act, and not reasonable, because it is to the prejudice of a third person.

But the reasonable way or meane intended by the statute, is by release or confirmation, or such conveyances as amount to as much.

*Señ. 703. Fo. 370.a.*

A Warranty lineall is a Covenant reall annexed to the Land by him which either was owner, or might have inherited the Land, and from whom his heire lineall or collaterall might by possibility have claimed the Land as heire from him that made the warranty.

In a *Jur. utr.* brought by a Parson of a Church, the Collaterall Warranty of his Ancestor is no barre, for that he demands the Land in the right of his Church, in his politick capacity; and the Warranty descendeth on him in his naturall capacity. 27 *H. 6. garr.* 48.

But some have holden that if a Parson bring an *Aff.* that a Collaterall warranty of his Ancestor shall bind him, for that the *Aff.* is brought of his possession and seisin, and he shall recover the meane profits to his own use 34 *E. 3. garr.* 71.

But seeing he is seised of the freehold, whereof the *Aff.* is brought in *jure Ecclesiæ*, which is in another right then the warranty, it seemeth that it should not be any barre in the *Aff.*

Aff. The like Law is of a Bishop, Archdeacon, Dean, Master of an Hospital, and the like, of their sole possessions, and of the Prebend, Vicar, &c.

King H. 3. gave a Manor to *Edmond Earl of Cornwall*, and to the heires of his body, saving the possibility of Reverter, and dyed. The Earl before the Statute of *W. 2. c. 1. de donis Cond.* by Deed gave the said Manor to another in fee with Warranty, in exchange for another Manor; and after the said Statute *Anno 28 E. 1.* dyeth without issue, leaving Affers in fee simple which is Warranty, and Affers descended upon King E. 1. as Cousin German, &c. And it was adjudged, that the King as heire to the said Earl *Edmond*, was by the said Warranty and Affers barred of the possibility of Reverter, which he had expectant upon the said gift, albeit the Warranty and Affers descended upon the natural body of King E. 1. as heir to a Subject, and E. 1. claimed the said Manor as in his Reverter *in jure Corona*, in the capacity of his Body Politick, in which right he was seised before the gift, 45 Aff. 6.6 E. 3. 56. *Pl. Com.* 234. & 553, 554. *Vide* 27 H. 6. *garr.* 40. 34 E. 3. *garr.* 71.

In this case how by the death of the said Earl *Edmond* without issue, the Kings Title by Reverter, and the Warranty and Affers came together, and that the Warranty was collateral; yet the King shall not be barred without Affers, as a Subject shall be, and many other things are to be observed in this case, which the learned Reader will observe. *Vide* Sect. 711. 712.

*Sect.* 704, 705. *Fo.* 371. a.

*Littleton* doth agree with the Authority of our Books, 46 E. 3. 6. 5 E. 3. 14. 19 H. 8. 12. so as the diversities do stand thus: 1. Where the disseisin and feoffment are *uno tempore*, and where at several times. 2. Where the disseisin is with intent to alien with Warranty, and where the disseisin is made without such intent, and the alienation with Warranty afterwards made.

*Sect. 706. ibid.*

Upon every Conveyance of lands, &c. as upon Fines, Feoffments, Gifts, &c. Releases and Confirmations made to the Tenant of the land, a Warranty may be made, albeit he that makes the Release or Confirmation hath no right to the land, &c. But some do hold, that by Releases or Confirmations, where there is no estate created, or transmutation of possession, a Warranty cannot be made to the Assignee; 14 E. 3. *Voucher* 108. 16 E. 3. *ibid.* 87. 18 E. 3. 6. 12 H. 7. 1. *Vide* S. 733, 738, 745.

*Sect. 707. Fol. 371. b.*

The opinion of *Littleton* in this case is holden for Law, against the opinions in 35 E. 3. *garr.* 73. 11 H. 4. 33.

*Sect. 708. Fol. 372. a.*

449 Hereby it appeareth, that a Warranty that is collateral in respect of some persons, may afterwards become lineal in respect of others, 8 R. 2. *garr.* 101. Whereupon it followeth, That a collateral Warranty doth not give a right, but bindeth onely a right so long as the same continueth: but if the collateral Warranty be determined, removed or defeated, the right is revived, 43 *Aff.* 44. 24 H. 8. *tit. Tail. Br.* 7. H. 5. 6. *tit. Aff.* 350. 34 E. 3. *Droit* 29. 19. H. 6. 59. 21. H. 7. 40. 5 H. 7. 29. 3 H. 7. 9. b. And yet in an Affize the Plaintiff hath made his Title by a collateral warranty, 16 *Aff.* p. 16. 27 *Aff.* 74. 29 *Aff.* 50. 43 *Aff.* 8. 14 H. 4. 13. 19 H. 6. 66.

*Barre*, signifieth legally a destruction for ever, or taking away for a time of the action of him that right hath.

178 *Nota*, That in some cases an estate Tail may be barred by some Acts of Parliament made since *Littleton* wrote; and in some cases an estate Tail cannot be barred, which might when *Littleton* wrote have been barred: For Example; if Tenant in Tail levy a Fine with Proclamation according to the Statute, this is a barre to the estate Tail, but not to him in reversion or remainder, if he maketh his claim, or pursue his

his action within five yeers after the estate Tail spent, 4 H. 7. c. 24. & 32 H. 8. c. 36.

If a gift be made to the eldest Son, and to the heirs of his body, the remainder to the Father, and to the heirs of his body, the Father dyeth, the eldest Son levieth a Fine with Proclamation, and dieth without issue, this barreth the second Son; for the remainder descended to the eldest, *Dalisons* 2 El. & 7 El. lib. 3. f. 84.

If Tenant in Tail be disseised, or have a right of action, and the Tenant of the land levy a Fine with proclamation, and five years pass, the right of the estate Tail is barred.

If Tenant in Tail in possession, or that hath a right of entry, be attainted of High Treason, the estate Tail is barred, and the land is forfeited to the King; and none of these were bars when *Littleton* wrote. A lineal Warranty and Assets was a barre to the estate Tail when *Littleton* wrote, 26 H. 8. c. 13. 33 H. 8. c. 20. 5 E. 6. c. 11. *St. pl. Cor.* 18.

A Common Recovery with a voucher over, and a Judgment to recover in value, was a barre of the estate Tail when *Littleton* wrote, 12 E. 4. 19. *Taltarums* Case.

And of Common Recoveries, there be two sorts, viz. one with a single Voucher, and another with a double Voucher, and that is more common and more safe; there may be more Vouchers over, *Vid. Sect. 690. & vide l. 3. f. 5. Cuppledicks* case, and fo. 94, 97, 106. *vide post.* \*\*

If the King had made a gift in Tail, and the donee had suffered a Common Recovery, this should have barred the estate Tail in *Littleton's* time, but not the reversion or remainder in the King. And so if such a donee had levied a Fine with proclamation after the Statute of 4 H. 7. this had barred the estate Tail, although the reversion was in the King, 38 H. 8. *Tail Br.* 41. *Pl. Com.* fo. 555. 29 H. 8. *Dyer* 52 \*\* *Com. Recoveries, &c. Vide l. 1. f. 62. Capels* case, l. 2. f. 16. 52, 74, 77. l. 6. f. 41, 32. l. 10. f. 37. *Mary Portingtons* case.

But since *Littleton* wrote, a Common Recovery had against Tenant in Tail of the Kings gift, &c. is no barre, &c. by the Statute of 34 H. 8. c. 20.

And where the words of the Statute be (Whereof the reversion or remainder at the time of such recovery had, shall be in the King) these ten things are to be observed upon the construction of that Act.

1. That the estate Tail must be created by a King, and not by any Subject.

2. The King must have the reversion at the time of the Recovery.

3. The reversion or remainder cannot be barred, but where the estate Tail in possession is barred, *l. 8. f. 77, 78. Seignieur Staffords case.*

4. If a Subject make a gift in Tail, the remainder to the King in fee, the estate Tail may be barred by a Common Recovery, *causa patet. l. 2. f. 52. Cholinleys case.*

5. So it is if the King had the remainder by descent.

6. The word (*Reversion*) in the body of the Act hath reference to these words (*given or granted*) and (*Remainder*) hath reference to these words (*otherwise provided.*) As if the King in consideration of money, or of Assurance of Land; or for other considerations, by way of provision, procure a Subject by Deed indented and inrolled, to make a gift in Tail to one of his Servants and Subjects, for recompence of service or other consideration, the remainder to the King in fee, and all this appear of Record; this is a good provision within the Statute, and the Tenant in Tail cannot by a Common Recovery barre the estate Tail. So it is if the remainder be limited to the King in Tail; bus if he be limited for years, or for life, it is otherwise, *Lib. 2. fol. 16. Wisemans case.*

7. Where a Common Recovery cannot barre the estate Tail by force of the said Statute, there a Fine levied in Fee, in Tail, for lives, for years, with proclamation according to the Statute, shall not barre the estate Tail, or the issue in Tail, where the reversion or remainder is in the King, by reason of these words in the said act (The said Recovery, or any other thing or things hereafter to be had, done or suffered, by, or against any such Tenant in Tail, to the contrary

not-

notwithstanding) which words include a Fine levied by such a donee, and restraineth the same, P. 31. *Eliz. Rot.* 1645. *Notleys case.* B. C.

8. But where a Common Recovery shall barre the estate Tail, notwithstanding that Statute, there a Fine with proclamation shall barre the same also.

9. Where the said latter words of the Statute be ( Had, done, or suffered, by, or against any such Tenant in Tail ) the sense and construction is, where Tenant in Tail is party or privy to the Act, be it by doing or suffering that which should work the barre, and not by meer permission, he being a stranger to the Act.

10. Albeit the Preamble of the Statute extends onely to gifts in Tail made by the Kings of England before the Act ( viz. hath given and granted, &c. ) and the body of the Act referreth to the Preamble ( viz. that no such fained Recovery hereafter to be had against such Tenant in Tail ) so as this word ( such ) may seem to couple the body and the Preamble together; yet in this case ( such ) shall be taken for such in equal mischief, or in like case; and by divers parts of the Act it appeareth, That the makers of the Act intended to extend it to future gifts, and so is the Law taken at this day.

A Recovery in a Writ of Right against Tenant in Tail without a Voucher, is no barre of any gift in Tail.

If Tenant in Tail, the remainder over in fee *cesse*, and the Lord recover in a *Cessavit*, this shall not barre the estate Tail, for the issue shall recover in a *Formedon*: neither were either of these barres when *Littleton* wrote, 33. E.3. *Judgement* 252.3 H.6. 55.10 H. 6.5.14 E. 4.5. b.15 E.4.8. F.N.B.134. b. Pl. Com. 237.28 E.3.95. F.N.B.28. I.

Sett. 702. Fol. 373. b.

*Nemo præsuntur alienam posteritatem suæ prætulisse.*

If a man that is innocent be accused of Felony, and it be found that he fled for the Felony, he shall forfeit all his goods and chattels, debts and duties, 3 E.3. *Corone Staf.*

But yet the general Rule is, *Quod stabitur præsumptioni donec probetur in contrarium*, Bract. l. 1. c. 9.

It hath been attempted in Parliament, that a Statute might be made, That no man should be barred by a Warranty collateral, but where assents descended from the same Ancestor; but it never took effect, for that it should weaken common assurances, Rot. Parliament. 50 E. 3. num. 77.

Señ. 710, 711, 712.

If husband and wife tenants in especial Tail have issue, a daughter, and the wife dye, the husband by a second wife hath issue another daughter, and discontinueth in fee and dyeth, a collateral Ancestor of the daughters releaseth to the discontinuee with Warranty, and dyeth, the Warranty descendeth upon both daughters, yet the issue in Tail shall be barred of the whole, for in judgement of Law the entire Warranty descendeth upon both of them, 5 E. 2. garr. 78. l. 8. fo. 41. *Sims case*.

Here note, That when one Coparcener doth generally enter into the whole, this doth not devest the estate which descended by Law to the other, unlesse she that doth enter, claimeth the whole, and taketh the profits of the whole. Vide Señ. 398.

Otherwise it is after the parceners be actually seised, the taking of the whole profits, or any claim made by the one, cannot put the other out of possession without an actual putting out of disseisin. And in this case of *Littleton*, when one Coparcener entreth into the whole, and maketh a Feoffment of the whole, this devesteth the Freehold in Law out of the other Coparcener.

Item, when the one sister enters into the whole, the possession being void, and maketh a feoffment in fee, this act subsequent doth so explain the entry precedent into the whole, that now by construction of Law she was onely seised of the whole, and this feoffment can be no disseisin, because the other sister was never seised, nor any abatement, because they both made but one heir to the Ancestor, and one Freehold



hold and inheritance descended to them, so as in judgement of Law the Warranty doth not commence by disseisin, or by abatement, and without question her entry was no intrusion, *Pl. Com.* 543. fo. 374. a.

Tenant in Tail hath issue two daughters, and discontinue in fee, the yongest disseiseth the discontinuee to the use of her self and her sister; the discontinuee ousteth her, against whom she recovereth in an Assize, the eldest agreeth to the disseisin, as she may, against her sister, and become joyntenant with her. And thus is the book in the 21 *Aff.* p. 19. to be intended, the case being no other in effect: But A. disseiseth one to the use of himself and B. B. agreeth, by this he is joyntenant with A. *Fol.* 374. b.

*Nota*, in these two last Sections four several Conclusions.

1. That a lineal Warranty doth binde the right of a fee simple.

2. That a lineal warranty doth not binde the right of an estate Tail, for that is restrained by the Statute of *donis Cond.*

3. That a lineal Warranty and Assers is a bar of the right in Tail, and is not restrained by the said Act.

4. That a collateral Warranty made by a collateral Ancestor of the donee, doth binde the right of an estate Tail, albeit there be no Assers; and the reason thereof is upon the Statute of *Donis Cond.* for that it is not made by the Tenant in tail, &c. as the lineal Warranty is, 3 E.3. 22. 4 E.3. 28. 50. *M.* 38 E.3. *Cor. Rege*, *Ab. de Colchest.* case, 45 *Aff.* 6. *Pl. Com.* 554. 19 E.4. 10. *Vide* S 703, 747.

To this may be added, That the Warranty of the Donee in Tail, which is collateral to the Donor, or to him in remainder, being heir to him, doth binde them without any Assers. For though the alienation of the Donee after issue doth not bar the Donor, which was the mischief provided for by the Act, yet the Warranty being collateral, doth bar both of them, for the Act restraineth not that Warranty, but it remaineth at the Common Law, as *Littleton* after

after faith. And in like manner the Warranty of the Donee doth barre him in remainder.

Note, Affets requisite to make lineal Warranty a barre, must have six qualities.

1. It must be Affets ( *ie.* ) of equal value, or more at the time of the discent.

2. It must be of discent, and not by purchase or gift.

3. It must be Affets in fee simple, and not in fee Tail, or for another mans life.

4. It must descend to him as heir to the same Ancestor, that made the Warranty, *Brit.* 185.4.E.3. *garr.* 63.16. E.3. *Aff.* 4.43. E.3.9.7. *H.* 6.3.11. *H.* 4.20.

5. It must be of Lands, or Tenements, or Rents, or Services valuable, or other profits issuing out of Lands, Tenements, and not personall Inheritances, as Annuities, &c.

6. It must be in state or interest, and not in use, or right of actions, or right of entry, for they are no Affets until they be brought into possession, 24. E. 3. 47.

But if a rent in fee simple issuing out of the Land of the heir descend unto him, whereby it is extinct, yet this is Affets, and to this purpose hath in Judgement of Law a Continuance, 31 E. 3. *Aff.* 5.13. E.3. *Recovery in value* 17.1.3.f. 31. *Butler and Bakers Case.*

A Seigniori in franck-Almoign is no Affets, because it is not valuable, and therefore not to be extended; and so it seemeth of a Seigniori of Homage and Fealty, 14.E.3. *Mesne* 7. *Regist.* 293.

But an Advowson is Affets, whereof *Fleta* l. 2. c. 65. saith, *Item de ecclesiis qua ad donationem Domini pertinent, quot sunt, & quae, & ubi, & quantum valeat qualibet Ecclesia per annum secundum veram ipsius estimationem, & pro Marca solidus extendatur, ut si ecclesia 100. Marcas valeat per annum ad 100. solidos extendatur advocatio per annum.* *Brit.* 185. 5. *H.* 7. 37. 32. *H.* 6.21. 33. E. 3. *garr.* 102.

*Sect. 714. Fol. 375. a.*

*Nota*, that albeit in this case the issue in Tail must claim as heir of both their bodies, yet the Warranty of either of them is lineal to the issue, 34 E. 3. *garr.* 73.

If Lands be given to a man and a woman unmarried, and the heirs of their two bodies, and they intermarry, and are disseised, and the husband releaseth with Warranty, the wife dieth, the husband dyeth, albeit the Donees did take by moities, yet the Warranty is lineal for the whole, because, as our Author here saith, the issue must in a *Formedon* convey to him the right as heir to the Father and his Mother of their two bodies ingendred, and therefore it is collateral for no part.

*Sect. 715, 716, 717.*

*Nunquam nimis dicitur, quod nunquam satis dicitur.*

And here it appeareth, That it is not adjudged in Law a collateral Warranty, in respect of the blood, for the Warranty may be collateral, albeit the blood be lineal, and the Warranty may be lineal, albeit the blood be collateral. But it is in Law deemed a collateral Warranty, in respect that he that maketh the Warranty, is collateral to the Title of him upon whom the Warranty doth fall, 8 R. 2. *gar.* 101. *vide Sect. 704.*

*Sect. 718. Fo. 376. a.*

Every Warranty doth descend upon him that is heir to him that made the Warranty at the Common Law. *Vide Sect. 3. 603, 735, 736, 737.*

Hereupon many things worthy to be known, are to be understood. 1. That if a man infeoff another of an acre of ground with Warranty, and hath issue two Sons, and dyeth seized of another acre of land of the nature of Borough English, the feoffee is impleaded; albeit the Warranty descendeth onely upon the eldest, yet may he vouch them both; the one as heir to the Warranty, and the other as heir to the

the Land. 40 E. 3. 14. So it is of heirs in Gavelkinde, &c. 22 E. 4. 10. And in like sort the heir at the Common Law, and the heir of the part of the Mother shall be vouched. 49 Aff. 4. 38. E. 3. 22. But the heir at the Common Law may be vouched alone in both these cases, at the election of the Tenant; *& sic de similibus.*

Also if a man dye seised of certain lands in fee, having issue a Son and a daughter by one venter, and a Son by another, the eldest Son enters and dieth, the land descends to the sister; in this case the warranty descendeth on the Son, and he may be vouched as heir, and the sister as heir of the land.

In which case, and in the other case of Borough English, the Son and heir by the Common Law having nothing by descent, the whole loss of the recovery in value, lieth upon the heirs of the land, albeit they be no heirs to the warranty. 32 E. 3. vouch. 94. 35 H. 6. 3.

Then put the case, that there is a warranty paramount, who shall deraign, that warranty, and to whom shall the recompence in value go? some have said, that as they are vouched together, so shall they avouch over, and that the recompence in value shall enure according to the losse, and that the effect must pursue the cause, as a recovery in value by a warranty of the part of the Mother shall go to the heir of the part of the Mother, &c. *Pl. Come. 515.*

Some others hold, that it is against the maxime of the Law, that they that are not heirs to the warranty should joyn in a voucher, or to take benefit of the warranty which descends not to them, but that the heir at the common Law, to whom the warranty descended, shall deraign the warranty, and recover in value, and that this doth stand with the rule of the common Law.

Others hold the contrary, and that this should be both against the rule of Law, and against reason also; for by the rule of Law, the vouchee shall never sue to have execution in value, untill execution be sued against him. But in this case execution can never be sued against the heir at the common

Law

Law, therefore he cannot sue to have execution over in value. Secondly it should be against reason, that the heire at the common law should have *totum lucrum*, and the especial heirs *totum damnum*. 17 E.2. *Recover in value* 33. 18 E. 3. 51. l.1.96. *Shelleyes case*.

I find in our Books, this reason is yielded, that the special heires should not be vouched only; for (say they) then could not they deraigne the warranty, which should be mischievous, that they should lose the benefit of the warranty, if they should be vouched onely. 32 E. 3. *vouch*. 94. *per Greene*.

But if the heire at the Common Law were vouched with them, (as by the Law he ought) all might be saved; and therefore study well this point, how it may be done.

If Tenant in general Tail be, and a common recovery is had against him, and his wife, where his wife hath nothing, and they vouch, and have judgement to recover in value, Tenant in Tail dyeth, and the wife surviveth; for that the issue in Tail had the whole losse, the recompence shall enure wholly to him, and the wife albeit she was party to the judgement, shall have nothing in the recompence, for that she loseth nothing. *Pl. Com. Fo.* 514.

If the Bastard eigne enter, and take the profits, he shall be vouched onely, and not the Bastard and the Mulier, because the Bastard is in apparance heire, and shall not disable himself. 17 E.3. 59. 20 E.3. *vouch*. 129. 5 H.7.2.

If a man be seised of Lands in *Gavelkind*, and hath issue three 448  
Sonnes, and by *Obligation* bind himself and his heires, and dieth, an action of debt shall be maintainable against all the three Sonnes, for the heire is not chargeable unlesse he hath lands by discent. 11 H.7.12. 11 E.3. *Det.7.Dy.5.El.* 238.

So if a man be seised of Land on the part of his Mother, and bind himself and his heirs by *Obligation*, and dyeth, an action of debt shall lye against the heire on the part of the Mother, without naming the heire at the Common Law; and so note a diversity between a personal lyen of a bond, and a reall lyen of a warranty.

Señt.

Señ. 719. Fol. 377. a.

171. Here it appeareth, that whensoever the Ancestor taketh any estate of freehold, a limitation after in the same conveyance to any of his heires, are words of limitation, and not of purchase, albeit in words it be limited by way of remainder, and therefore here the remainder to the heires females vesteth in the Tenant in tail himself. 24 E. 3. 36 27 E. 3. Age 108. 38 E. 3. 26. 40. E. 3. 5. 37 H. 8, Br. *nosme. 1. & 40. & tit done & Rem 61.*

The issues inheritable must make their claim, either only by Males, or only by Females, so as the Females of the Males or Males of the Females, are wholly excluded, &c. 1 H. 6. 4. *Pl. Com. 414. Vide Señ. 24.*

But where the first limitation is to the heires males, let the limitation be for default of such issue to the heires of the body of the donee, and then all the issues, be they Females of Males, or Males of Females are inheritable.

If a man give Lands to a man, to have and to hold to him, and the heires Males of his body, and to him, and to the Heires Females of his body, the estate to the heires Females is in remainder, and the daughter shall not inherit any part, so long as there is issue Male.

Señ. 720.

*Nihil simul inventum est & perfectum; & saepe viatorem nova non vetus orbita fallit;* and therefore new inventions in assurances are dangerous. 22 H. 6. 33. l. 6. f. 42. b. Sir Anthony Mildmayes case.

*Non profunt dominis quæ profunt omnibus artes: quoniam, In suo quisque negotio hebetior est, quam in alieno.* 2 H. 4. fo 11. *Action sur le case.*

Señ. 721. Fol. 378. a.

Every remainder which cometh by deed ought to vest in him to whom it is limited, when livery of seisin is made to him, that hath the particular estate.

1. Littleton saith by Deed, because if Lands be granted and rendred by Fine for life, the remainder in Taile, the remainder in Fee, none of these remainders are in them in the remainder, until the particular estate be executed. 7 R.2. *scire facias*.

2. That the remainder be in him, &c. at the time of the livery. This is regularly true, but yet it hath divers exceptions. As, where the remainder is to commence upon limitation of time, viz. upon the possibility of the death of one man before another, which is a common possibility. *Pl. Com. Colthirsts case, fo. 65.29.32 H.6. tit. feoffments, &c. 99.27. E.3.87.12 E.4.2.21 H.7.11.7 H.4.23.11 H.4.74.18 H.8.3.27. H.8.42.38 E.3.26.30. Aff.47.6 R.2 qu. Iur. Dam. 20.*

A man letteth lands for life upon condition to have Fee, and warranted the land in *forma predicta*, afterward the lessee performeth the conditions whereby the lessee hath fee, the warranty shall extend and increase according to the State. And so it is in that case if the lessor had dyed before the performing of the condition, &c. and yet the lessor himself was never bound to the warranty; but it hath relation from the first livery; and by this it appeareth that a warranty being a Covenant reall executory may extend to an estate in *futuro*, having an estate, whereupon it may work in the beginning.

But otherwise it is, if a man grant a Seigniorie for yeares upon condition to have fee with warranty in *forma predicta* &c.

And so it is, if a man make a Lease for yeares, the remainder in fee, and warrant the Land in *forma predicta*, he in the remainder cannot take benefit of the Warranty, because he is not party to the Deed, and immediately he cannot take, if he were party to the Deed, because he is named after the *habendum*, and the estate for yeares is not capable of a warranty. 458.

And so it is if Land be given to A. and B. so long as they jointly together live, the remainder to the right heires of them, that dieth first, and warrant the land in *forma predicta*



*dicta*, A. dyeth, his heir shall have the warranty; and yet the remainder vested not during the life of A. for the death of A. must precede the remainder, and yet shall the heir of A. have the Land by descent.

*Sect. 722. Fol. 378.b-*

*Sile 1. fits alienast, &c.* By the Alienation of the Donee two things are wrought.

1. The Franktenement and Fee is in the Alienee.
2. The reversion is divested out of the donor; and therefore by the alienation that transferreth the freehold, and fee simple to the Alienee, there can no remainder be raised and vested in the second sonne. 27 H. 8. 24. 6. R. 2. *quod jur. clam.* 23.

Also an estate of an inheritance in Lands, and Tenements cannot cease, or be void before the state be defeated by entry, then if this remainder should be good, then must it give an entry upon the Alienee to him that had no right before, which should be against the expresse rule of Law, *viz.* That an estate cannot be given to a stranger to avoid a voidable Act.

One Alienation cannot vest an estate of one and the same Land to two severall persons at one time.

If a man seised of an Advowson in fee, by his deed grant the next presentation to A. and before the Church become void, by another Deed grant the next presentation of the same Church to B. the second grant is void, for A. had the same granted to him before, and the grantee shall not have the second avoidance by construction to have the next avoidance which the grantor, might lawfully grant, for the grant of the next avoidance doth not import the second presentation. But if a man seised of an Advowson in fee take wife; now by Act in Law is the wife intituled to the third presentation, if the husband dye before: The husband grants the third presentation to another, the husband dye, the heir shall present twice, the wife shall have the third presentation, and the grantee the fourth; for in this case it shall be taken

taken the third Presentation, which he might lawfully grant; and so note a diversity between a Title by act in Law, and by act of the party, for the act in Law shall work no prejudice to the grantee.

*Periculosum est res novas & inusitatas inducere.*

*Eventus varios res nova semper habet, vide §. 87, &c.*

*Seft. 723. fol. 379. a.*

Here by the Opinion of *Littleton*, the Donor may re-enter for the condition broken, for *Utile per inutile non vitiatur*, which being in case of a condition, for the defeating of an estate, is worthy of Observation. And it is to be noted, That after the death of the Donor, the condition descendeth to the eldest Sonne, and consequently his alienation doth extinguish the same for ever, wherein the weaknesse of this invention appeareth; and therefore *Littleton* here saith, That it seemeth that the Donor may re-enter, and speaketh nothing of his heirs.

A man hath issue two Sons, and maketh a gift in Tail to the eldest, the remainder in fee to the puisne, upon condition that the eldest shall not make any discontinuance with warranty to barre him in the remainder, and if he doth, that then the puisne Son and his heirs shall re-enter; the eldest maketh a feoffment in fee with warranty, the Father dyeth, the eldest Son dyeth without issue, the puisne may enter. But if the discontinuance had been after the death of the Father, the puisne could not have entred.

In this case four points are to be observed :

1. As *Littleton* here saith, the entry for the breach of the Condition is given to the Father, and not to the puisne Sonne.

2. That by the death of the Father the condition descends to the elder Sonne, and is but suspended, and is revived by the death of the eldest Son without issue, and descendeth to the youngest Son, 41 E. 3. vide *Seft. 446*.

3. That the feoffment made in the life of the Father, D d cannot

cannot give away a condition that is collaterall, as it may doe a right.

4. That a Warranty cannot binde a Title of entry for a condition broken, but if the discontinuance had been made after the death of the Father, it had extinguisht the condition; which case is put to open the reason of our Authors opinion.

The ancient Judges and Sages of the Law, have ever (as it appeareth in our Books) suppressed innovations and novelties in the beginning, as soon as they have offered to creep up, lest the quiet of the Common-wealth might be disturbed, 31 Ed. 3. *Gager delivery* 5. 22 Aff. 12. 38 Ed. 3. 1. 2 H. 4. 18, &c. And so have Acts of Parliament done the like, 1 Ed. 3. cap. 15. Stat. 3. 18 Ed. 3. cap. 1. & 6. 4 Hen. 4. cap. 2. 11 Hen. 6. cap. 23. 12 Ed. 4. cap. 8, &c.

*Sect. 726. fol. 380. a.*

Here note this diversity; If the heir be within age at the time of the discent of the Warranty, he may enter and avoid the estate either within age, or at any time after his full age, 18 Ed. 4. 13. 35 Hen. 6. 63. 28 Aff. 28. 32 Ed. 3. *garr.* 30. and *Littleton* saith well, That the Infant in this case may enter upon the Alience, for if he bring his action against him, he shall be barred by this Warranty, so long as the state whereunto the Warranty is annexed continues, and be not defeated by entry of the heir; but if he be within age at the time of the alienation with Warranty, and become of full age before the discent of the Warranty, the Warranty shall barre him for ever.

Our Author putteth his cases where the entry of the Infant is lawfull; for where it is not lawfull when the Warranty descendeth, the Warranty doth binde the Infant, as well as a man of full age; and the reason is, because the state whereunto the Warranty was annexed continueth, and cannot be avoided but by action, in which action the Warranty is a barre. And so it is of a Feme covert, if her entry be not lawfull, a Warranty descending on her during the cover-

ture

ture doth bind her : and albeit the husband be within age at the discent of the warranty, yet if the entry of the wite be taken away, the warranty shall bind the wite, 8 Ed. 3. 3. 3 H. 7. 9. Br. tit. War. 54. 33 H. 8. War. Br. 84. l. 1. f. 67. a. *Archers Case*, and 140. *Chudleys Case*.

Note a diversity between matters of Record done or suffered by an Infant, and matters *in fait*, for matters *in fait* he shall avoid either within age or at full age ; but matters of Record, as Statute Merchant, Staple, Recognizances known by him, or a Fine levied by him, Recovery against him by default in a reall action (saving in Dower) must be avoided by him, *viz.* Statute, &c. by *Andita querela*, and the Fine and Recovery by Writ of Error during his minority, and the like ; because they are judiciall acts, and taken by a Court or a Judge, therefore the nonage of the party, to avoid the same, shall be tryed by inspection of Judges, and not by the Countrey, 20 Ed. 3. *Andita querela* 27. F.N.B. 104. k. 6 Ed. 3. 39. 17 Aff. 53. 17. 21 E. 2. 4. 15 E. 4. 5. 8 Hen. 6. 30. 1 Hen. 7. 15. 6 Hen. 8. *Saver default*. Br. 50. 3 Hen. 6. 10. 1 Mar. Dyer 104.

And for that this nonage must be tryed by inspection, this cannot be done after his full age : But if the age be inspected by the Judges, and Recorded that he is within age, albeit he come of full age before the Reversall, yet may it be reversed after his full age, P. 13. *Ja. R. in Banco Regi*, fol. 380. b.

No negligence shall be adjudged in an Infant, where he is thereby to be barred of his entry in respect of a former right, as by a discent, or of his former right ( as *Littleton* doth here put an Example ) by a Warranty, where his entry is congeable.

But otherwise it is of Condition, Charges and Penalties going out of, or depending upon the Originall Conveyance, for the laches or negligence shall be adjudged in those cases as well in the Infant, as in any other. *vide Pl. Com.* 355, &c. *Stowels Case*.

And see further there, where an Infant being Tenant for life

life or years, shall be punished for doing or suffering of waste ; and where he claimeth by purchase, a *Cessavit* shall lie against him, if he pay not his rent by two years. And some have said, if he have the Tenancy by discent, and he himself *cesse*, a *Cessavit* doth lie, and he shall not have his age, because it is of his own *cesser*, 31 *Ed. 3. Age 54.* But other Books ( as some conceive them ) be against that, *vide 9 Edw. 3. 50. 28 Ed. 3. 99. 14 Ed. 3. Age 88. 2 Ed. 2. Age 132.* and others ; which Books doe not prove that the *Cessavit* doth lie in that case, but the contrary, that he shall have his age, to the end he may at his full age certainly know what to plead, or what arrerages to tender, for the land was originally charged with the Seigniorie and Services, *Seff. 728. \*\**

Note three things concerning the construction of Statutes :

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1. That it is the most naturall and genuine Exposition of a Statute, to construe one part by another, &c. for that best expresseth the meaning of the makers, *Pl. Com. 75. 7 Ed. 3. 89.* As here the question upon the generall words of the Statute is, Whether a Fine levied only by a husband seised in the right of his wife with Warranty, shall barre the heir without Assets ? And it is well expounded by the former part of the Act, whereby it is Enacted, That Alienation made by Tenant by the Curtesie with Warranty, shall not barre the heir, unlessse the Assets descend. *Braet. lib. 4. fol. 321. Fleta lib. 5. cap. 34.* And therefore it should be inconvenient to intend the Statute in such manner, as that he that hath nothing but in the right of his wife, should by his Fine levied with Warranty barre the heir without Assets : and this Exposition is *ex visceribus actus.*

2. The words of an Act of Parliament must be taken in a lawfull sense, as here the words being [*whereof no Fine is levied in the Kings Court*] are to be understood, whereof no Fine is lawfully or rightfully levied &c. and therefore a Fine levied by the husband alone, is not within the meaning of the Statute, for that Fine should work a wrong to the wife ; but a Fine levied by the husband and wife, is intended by the

the Statute, for that Fine is lawfull, and worketh no wrong, *Pl. Com.* 246. *Seignieur Barklays case*, l. 9. fol. 26. *Abbot de Strata Marc.* and generally the Rule is, *Quod non præstat impedimentum quod de jure non sortitur effectum.* Vide fol. 381. b. 11 H. 4. 80.

3. That constructions must be made of a Statute in suppression of the mischief, and in advancement of the remedy, as by this case it appeareth. For a Fine levied by the husband onely, is within the letter of the Law; but the mischief was, the heir was barred of the Inheritance of his Mother, by the warranty of his Father without Assets: and this Act intended to apply a remedy, *viz.* That it should not barre unlesse there were Assets, and therefore the mischief is to be suppressed, and the remedy advanced, *Et qui hæret in littera, hæret in Cortice.*

*Seet. 731. Fol. 383. a.*

*Nullius hominis autoritas tantum apud nos valere debet, ut meliora non sequeremur, si quis attulerit,* 8 E. 2. gar. 81. 18. E. 3. 51. 7 E. 3. 84. *Pl. Com.* 57.

The Judge if he knoweth it, ought not to take knowledge of a Fine, that worketh awrong to a third person, 33 H. 6. 5 2. 5 E. 3. 56. 2 El. Dyer 178. 1 H. 8. 1. M. 89. 4 E. 3. 41. 7 El. Dyer. 246.

*Seet. 733. Fo. 383. a.*

The feoffor may by expresse words warrant the land for the life of the feoffee, or of the feoffor &c. but the Recovery in value shall be in fee. 38 E. 3. 14.

*Et ego & hæredes mei warrantum tali & hæred. suis tantum, vel tali & hæred. assign. & hæred. assignatorum, vel assign. assignator. & eorum hæred. & acquietabimus, & defendemus, &c.* *Bract.* fo. 37. 248. & l. 5. 380, 381. *Brit.* 106.

*Per hoc autem quod dicit (acquietabimus) obligat se & hæredes suos ad acquietand. si quis plus petierit servitii vel aliud servitium quàm in carta Donationis continetur. Per hoc autem quod dicit (Defendemus) obligat se & hæredes suos ad defend.*

*fi quis velit servitutem ponere rei data contra formam sue donationis.*

If a man be bound to *A.* in an Obligation to defend such lands to *A.* whereof the Obligor hath infeoffed him for 12 years, &c. in this case, if he be ousted by a stranger without being impleaded, the Obligation is forfeit: But if he be bound to warrant the land &c. the bond is not forfeit unless the Obligee is impleaded, and then the Obligor must be ready to warrant, &c. 2 E. 4. 15. tit. Del. 71. *Qui bene distinguit, bene docet*, fol. 384. 2.

A Warranty in Deed is created onely by this word *Warrantizo*, but Warranties in Law are created by many other words; they are therefore called Warranties in Law, because in Judgement of Law they amount to a Warranty without this Verb *Warrantizo*.

As *Dedi* is a Warranty in Law to the feoffee and his heirs during the life of the feoffor, but *concessi* in a Feoffment or Fine implieth no Warranty.

But before the Statute of *Quia Emp. ter.* if a man had given lands by this word *Dedi*, to have and to hold to him and his heirs, of the Donor and his heirs, by certain Services, then not onely the Donor, but his heirs also had been bound to warrant.

But if before the Statute a man had given lands by this word *Dedi*, to a man and his heirs for ever, to hold of the chief Lord, there the feoffor had not been bound to Warranty but during his life, as at this day he is. *Leſtat. de Bigamisc. 6. 2 H. 7. 7. 6 H. 7. 2. 48 E. 3. 2. 31 E. 1. vouch. 290. F.N.B. 134. b. 6 E. 2. vouch. 258.*

*Dedi*, doth import a warranty in Law, albeit there be an expresse warranty in the Deed. For if a man make a feoffment by *Dedi*, and in the Deed doth warrant the land against I. S. and his heirs, yet *Dedi* is a generall warranty during the life of the feoffor, and so was the Statute expounded in both points. *H. 14. El. in Com. Banc.* And if a man make a lease for life reserving a rent, and adde an expresse warranty, here the expresse warranty doth not take away



away the warranty in Law, for he hath election to vouch by force of either of them: and in *Nokes Case*, note a diversity between a warranty, that is a Covenant, and a warranty concerning a Chattell: *l. 4. fo. 80. 8 E. 3. 69. 3 E. 3. Formedon 44.*

Also this word *exambium* doth imply a warranty. Also a *Petition* implyeth a warranty in Law; and homage *Aunc* doth draw to it selfe warranty. *4 E. 2. vouch. 245. 22 E. 3. 3. 14 H. 6. 2. 20 H. 6. 14. l. 4. 123. l. 1. 96. l. 5. fo. 17. l. 8. 75. Seignior Staf. case.*

And note that the warranty wrought by this word *dedi*, is a speciall warranty, and extends to the heirs of the Feoffee during the life of the donor only. But upon the exchange & *Homage Aunc*, the warrant extending reciprocally to the heires, and against the heires of both parties: and in none of these cases, the Assignee shall vouch by force of any of these warranties; but in the case of the exchange and *dedi*, the Assignee shall rebutt, but not in the case of *Homage Aunc*estrel.

And so no man shall have a writ of *contra formam collationis*, but onely of the feoffee and his heirs, which be privy to the Deed; but an Assignee may rebutt, by force of the Deed. *28 Aff. 33. 14 H. 4. 5. 11 E. 3. Avowr. 100. 30 H. 6. 7. 33 H. 8. Dy. 51. 10 H. 7. 11 b. F. N. B. 163. a.*

If a man make a gift in Taile, or a Lease for life of land, by deed, or without deed, reserving a rent, or of a rent service by deed, this is a warranty in Law, and the donee, or lessee being impleaded shall vouch, and recover in value, and this warranty extendeth not onely against the donor, or lessor, and his heirs, but also against his Assignees of the reversion, and so likewise the Assignee of lessee for life shall take benefit of this warranty in Law. *6 E. 2. vouch. 105. 5 E. 3. 67. 3 H. 7. 13. 6 H. 7. 2. 7 E. 3. 6. F. N. B. 134. g.*

When dower is assigned, there is a warranty in Law included, that the Tenant in Dower being impleaded, shall vouch, and recover in value a third part of two parts, whereof she is Dowable. *4 E. 3. 36. 43. Aff. 32. 50 E. 3. 7. F. N. B. 149. m.*

A warranty in Law and Assets is in some cases a good barre. In a *Formedon* in the discender the Tenant may plead that the Ancestor of the demandant exchanged the Land with the Tenant for other Lands taken in exchange, which descended to the demandant, whereunto he hath entred and agreed; or if he hath not entered, and agreed unto the Lands taken in exchange, then the Tenant may plead the warranty in Law, and other Assets descended. 14 H. 6. 2. 15 E. 3. Bar. 255.

If Tenant in Taile of Lands make a gift in Taile, or a Lease for life, render a rent, and dyeth, and the issue bring a *Formedon* in the descending, the Reversion, and rent shall not barre the demandant, because by his *Formedon*, he is to defeat the reversion and rent. *Et non potest adduci exceptio ejusdem rei, cujus petitur dissolutio.* 38 E. 3. 22. 23. 24. 13 E. 3. gar. 35.

But if other Assets in fee simple doe descend, then this warranty in Law and Assets is a good barre in the *Formedon*. 16 E. 3. Age 45. 31 E. 3. gar. 29.

Here four things are to be observed. 1. That no warranty in Law doth barre any collaterall title, but is in nature of a lineall warranty, wherein note the equity of the Law. Fo. 384. b.

2. That an expresse warranty shall never binde the heirs of him that made the warranty unlessse they be named, but in case of warranty in Law, in many cases the heires shall be bound to warranty, albeit they be not named.

3. That in some cases warranties in Law do extend to execution in value, of speciall Lands, and not generally of Lands descended in fee simple. lib. 4. fol. 121. *Bustards Case*.

4. That warranty in Law may be in some cases created without Deed, as upon gifts in Taile, Leases for life, exchanges, and the like. 45 E. 3. 20. b.

Also it is necessary to shew who shall take advantage of a warranty, as Assignee by way of voucher to have recompence in value.

If a man infeoffe *A.* and *B.* to have and to hold to them and their heires and Assignes, with a clause of warranty *predictis A. and B. & eorum hered. & Assignatis*, in this case if *A.* dyeth, and *B.* surviveth, and dyeth, and the heire of *B.* infeoffeth *C.* he shall vouch as Assignee, and yet he is but the Assignee of the heir of one of them, for in judgment of Law the Assignee of the heire is the Assignee of the Ancestor, and so the Assignee of the Assignee shall vouch in *infinitum*, within these words (his Assignes) 14 E. 3. gar. 33. 13 E. 1. gar. 83. lib. 5. fol. 17. b. *Spencers case.* 38 E. 3. 21.

If a man infeoff *A.* to have and to hold to him, his Heires and Assignes, *A.* infeoffeth *B.* and his heirs, *B.* dyeth, the heire of *B.* shall vouch as Assignee to *A.* so as heires of Assignees, and Assignees of Assignes, and Assignes of Heirs, are within this word (Assignes) which seemed to be a *Qu.* in *Braetons* time, and the Assignee shall not onely vouch, but have a *Warrantia Cartæ*, 12 E. 2. vouch. 263. 19 E. 2. gar. 85. 13 E. 1. ib. 93. 36 E. 3. gar. 1. 4 H. 8. Dyer 1. F. N. B. 135.

If a man doth warrant Land to another without this word (Heires) his heirs shall not vouch; and regularly if he warrant land to a man and his heirs, without naming Assignes, his Assignee shall not vouch. But if the Father be infeoffed with Warranty to him and his heires, the Father infeoffeth his eldest Son with Warranty, and dyeth, the Law giveth to the Son advantage of the Warranty made to his Father, because by act in Law, the Warranty between the Father and the Son is extinct, 43 E. 3. 23. 24 E. 3. 3. 11 H. 4. 94. 5 E. 3. Age 19. *Pl. Com.* 418.

But note a diversity between a Warranty that is a Covenant real, which binderth the party to yield Lands or Tenements in recompence, / and a Covenant annexed to the Land, which is to yield but damage, for that a Covenant in many cases extendeth further then the Warranty. As for Example;

It hath been adjudged, that where two Coparceners made par-

partition of Land, and the one made a Covenant with the other, to acquit her and her heirs of a Suit that issued out of the Land, the Covenantee aliened: in that case the Assignee shall have an action of Covenant, and yet he was a stranger to the Covenant, because the acquitall did run with the land, 42 E. 3. b. per Finchden, fol. 385. a.

A. seised of the Manor of D. whereof a Chappel was parcel, a Prior with the assent of his Covert, Covenants by Deed indented with A. and his heirs, to celebrate divine Service in his Chappel weekly, for the Lord of the Manor and his Servants, &c. In this case the assignees shall have an action of Covenant, albeit they were not named, for that remedy by covenant doth run with the Land, to give damages to the party grieved, and was in manner appurtenant to the Manor, 42 E. 3. 3. a. Lawrence Pakenhams case. 6 H. 4. 1. Ralph Brabsons case.

But if the Covenant had been made with a stranger to celebrate divine Service in the Chappell of A. and his heirs, there the Assignee shall not have an action of Covenant, for the Covenant cannot be annexed to the Manor because the Covenantee was not seised of the Manor. *Vide lib. 5. fol. 17, 18. Spencers case. 2 H. 4. 6. H. Hornes case.*

And note, that an Assignee of part of the Land shall vouch as Assignee.

As if a man make a feoffment in fee of two acres to one, with Warranty to him, his Heirs Assignes; if he make a feoffment of one acre, that feoffee shall vouch as Assignee; 298. for there is a diversity between the whole estate in part, and part of the estate in the whole, or of any part.

As if a man hath a Warranty to him, his Heires and Assignes, and he make a lease for life, or a gift in Tail, the lessee or donee shall not vouch as Assignee, because the whole estate is out of the lessor or donor, and by this means he shall take advantage of the Warranty. <sup>not</sup> ~~but he may vouch as assignee~~ <sup>the lessor</sup>

But if a lease for life, or a gift in Tail be made, the remainder over in fee, such a lessee or donee shall vouch as Assignee, because the whole estate is out of the lessor, and the

the particular estate and the remainder do in Judgment of Law to this purpose make but one estate, 18 E. 4. 52. 10 E. 3. 58. 5 E. 3. 40. Accord. H. 14. 1. in *Com. Banc.*

If a man infeoff three with Warranty to them and their heirs, and one of them release to the other two, they shall vouch; but if he had released to one of the other, the warranty had been extinct for that part, for he is an Assignee, 40 E. 3. 14. 40 Aff. 5. 33 H. 6. 4. 37 H. 8. *Alienation &c.* 31. 8 H. 4. 8.

If a man doth warrant land to two men and their heirs and the one make a feoffment in fee, yet the other shall vouch for his moiety, 11 R. 2. *Detin.* 46. 7 E. 3. 35. 46 E. 3. 4.

If a man at this day be infeoffed with warranty to him, his heirs and assigns, and he make a gift in Tail, the remainder in fee, the donee make a feoffment in fee, that feoffee shall not vouch as Assignee (but \* he that cometh in in privacy of estate.)

If the warranty be made to a man and his heirs, without this word (Assigns) yet the Assignee or Tenant of the Land may rebutte; and albeit no man shall vouch or have a *Warrantia Carta*, either as party, heir or Assignee, but in privacy of estate, yet any that is of another estate, be it by Disfeisin, Abatement, Inrusion, Usurpation, or otherwise, shall rebut by force of the warranty, as a thing annexed to the Land, which sometimes was doubted in our Books, 38 E. 3. 21. 26 E. 3. 56. 1. 10. fo. 96. b. *Seymors Case.* 10 Aff. 5. 35 Aff. 9. 22 Aff. 3. 988. 31 Aff. 13.

But herein note a diversity, when he that rebutteth claimeth under the warranty, and when he claimeth above the warranty, for there he shall not rebut.

And therefore if Lands be given to two Brethren in fee simple, with a warranty to the eldest and his heirs, the eldest dyeth without issue, the survivor, albeit he be heir to him, yet shall he neither vouch nor rebut, nor have a *Warrantia Carta*, because his Title to the Land is by relation above the fall of the warranty, and he cometh not under the estate of

of him to whom the warranty is made, as the disseisor &c. doth.

If a man make a gift in Tail at this day, and warrant the land to him, his heirs and assigns, and after the donee make a feoffment, and dyeth without issue, the warranty is expired as to any Voucher or Rebutter, for that the estate Taile whereunto it was knit, is spent : Otherwise it is if the gift and feoffment had been made before the Statute of *Donis Cond.* for then both the donee and feoffee had a fee simple ; and so are our Books to be intended in this and the like cases, *Lib. 3. fo. 63. Linc. Coll. case.*

If *A.* be seised of Lands in fee, and *B.* release unto him, or confirmeth his estate in fee with warranty to him, his heirs and assigns, All men agree this warranty to be good : but some have holden, That no warranty can be raised upon a bare Release or Confirmation, without passing some estate, or transmutation of possession, *14 E. 3. garr. 108. 12 H. 7. 1.*

But the Law, as it appeareth by *Littleton* himselfe, is to the contrary ; and that both the party, and ( as some doe hold ) his Assignee, shall vouch ; but he that is vouched in that case must be present in Court, and ready to enter into the warranty and to answer ; and the Tenant must shew forth the Deed of Release or Confirmation with warranty, to the intent the Demandant may have an answer thereunto, and either deny the Deed or avoid it ; for that at the time of the Confirmation made, he to whom it was made, had nothing in the land &c. for otherwise the Demandant may counterplead the Voucher by the Statute of *W. 1 cap. 40. viz.* that neither Vouchee, nor any of his Ancestors, had any seisin whereof he might make a feoffment. And this is grounded upon the said Statute of *W. 1. Sil neit son gar. en present, que lun voile gar. de son gree, & maintenant enter en respons*, otherwise the Tenant must be driven to *Warrantia Cartæ*, *11 H. 4. 22. 10 E. 3. 52. 21 E. 3. 37. Vide Sect. 706. 738. & 745. & Vide 20 E. 1. Stat. ad vocat. ad war.*

But a warranty of it selfe cannot enlarge an estate, as if the

the lessor by Deed release to his lessee for life, and warrant the land to the lessee and his heirs, yet doth not this enlarge the estate, 22 Hen. 6. 15. 2 Hen. 4. 13. 43 Ed. 3. 17. 43 Ass. 42. 12 Ass. 17. 12 Ed. 3. Tail. 3. 22 Ed. 4. 16. b. 44 Ed. 3. 10. 44 Ass. Bassingborns Ass.

If a man make a feoffment in fee with Warranty to him his heirs and assigns by Deed, (as it must be) and the feoffee infeoffe another by paroll, the second feoffee shall vouch, or have a *Warrantia Cartæ* as Assignee, albeit he hath no Deed of the Assignment, l. 3. 63.

If a man infeoffe two, their heirs and assigns, and one of them make a feoffment in fee, that feoffee shall not vouch as Assignee, 29 Edw. 3. 70. 17 Edw. 2. Joynd. in action 1. 11 Edw. 4. 8.

It a man make a feoffment in fee to *A.* his heirs and assigns, *A.* infeoffe *B.* in fee, who re-infeoffe *A.* He or his assigns shall never vouch, for *A.* cannot be his own Assignee. But if *B.* had infeoffed the heir of *A.* he may vouch as Assignee, for the heir of *A.* may be Assignee to *A.* in as much as he claimeth not as heir.

*Sect. 734. fol. 386. a.*

The Heir shall never be bound by any expresse warranty, but where the Ancestor was bound by the same warranty, 31 Ed. 1. gar. 83.

*Nota quod hæres non tenetur in Anglia ad debita antecessoris reddenda nisi per antecessorem ad hoc fuerit obligatus, præterquam debita regis tantum: A fortiori in case of Warranty which is in the realty, Fleta lib. 2. cap. 55. Brit. fol. 65. b. 11 Hen. 6. 48.*

But a Warranty in Law may binde the Heir, although it never bound the Ancestor, and may be created by a last Will and Testament. As if a man devise lands to *A.* for life or in Tail, reserving a rent, the devisee for life or in Tail, shall take advantage of this warranty in Law, albeit the Ancestor was not bound, and shall binde his heirs also  
to



to Warranty, although they be not named. Also an expresse Warranty cannot be created without Deed, and a Will in writing is no Deed, and therefore an expresse Warranty cannot be created by Will, 18 Ed. 3. 8.

*Seff. 736. fol. 386. b.*

431. Note a diversity, the lien reall, as the Warranty, doth ever descend to the heir at the Common Law; but the lien personall doth binde the speciall heirs, as all the heirs in Gavelkinde, and the heir on the part of the Mother, *vide Seff. 603, 718, 737. 11 E. 3. 7. 11 Hen. 7. 12.*

If two men make a feoffment in fee with warranty, and the one dyeth, the feoffee cannot vouch the survivor onely, but the heir of him that is dead also; but otherwise if two joyntly binde themselves in an Obligation, and the one die, the survivor only shall be charged, 17 E. 3. *Joynt. 41. 16 H. 7. 13. 29 E. 3. 46. 12 H. 7. 3. 22 E. 3. 1. 17 E. 3. 8. 30 E. 3. 43. 19 H. 6. 55. l. 3. f. 14. Mat. Herberts Case.*

Two brothers by demy-venters, the eldest releaseth with warranty to the disseisor of the Uncle, and dyeth without issue, the Uncle dyeth, the warranty is removed, and the younger brother may enter into the Land, *Seff. 737.*

*Seff. 738. fol. 387.*

A warranty may be limited, and a man may warrant lands as well for term of life, or in Tail, as in fee, 38 Ed. 3. 14. 16 E. 3. *Vouch. 87.*

If Tenant in fee simple that hath a warranty for life, either by an expresse Warranty or by *Dedi*, be impleaded and vouch, he shall recover a fee simple in value, albeit his warranty were but for term for life, because the warranty extended in that case to the whole estate of the feoffee in fee simple: but in the case that *Littleton* here putteth, the Tenant for life shall recover in value but an estate for life, because the warranty doth extend to that estate onely, *vide Seff. 733. & 706.*

And

And here ( in this Section ) is implied, that a collaterall <sup>422</sup> Warranty giveth no right, but shall barre onely for life, and after the party is restored to his action.

Also note, that a Warranty may descend to the heirs of him that made it during the life of another.

## Sect. 739.

*Si un home lessa ses terres a un aut. aver & tenant a luy & a ses heires pur terme d'auter vie, & le lessée mor. vivant celui a que vie, &c. & un estranger enter en la terre, l'heire le lessée luy doit ouster, &c.* The heir of the lessee shall have the Land to prevent an occupant ; and so it is in case of an annuity, or of any other thing that lieth in grant, whereof there can be no occupant, 77 E. 3. 48. 18 E. 3. 12. 11 H. 4. 42. 7 H. 4. 46. 8 H. 4. 15. Dyer 8 Eliz. 253. 18 H. 8. 3. 27 H. 8. 21 H. 8. Estat. Br. 10. 10 E. 3. Account 56. 33 Ass. p. 17. 22 H. 6. 33. 39 E. 3. 37. vide Sect. 387. <sup>252</sup>

## Sect. 740.

Chattels as well reall as personall shall goe to the Executor, or Administrator, 11 E. 3. tit. Ass. 88. 11. Ass. 21. 10 Eliz. Dyer 276.

But if the Kings Tenant by Knights service in Capite be seised of a Manour, whereunto an Advowson is appendant, and the Church become void, the Tenant dyeth and his heir within age, the King shall present to the Church, and not the Executor or Administrator : but if the Land be holden of a common person, in that case the Executor shall present, and not the Guardian, 24 E. 3. 26. F. N. B. 33. b. & 34. a.

If a Bishop hath a Ward fallen and dyeth, the King shall not have the Ward nor the Successor, but the Executor, and the Ward shall be Assets in his hands. So it is of Herlots, Relief, &c. 40 E. 3. 14.

But if a Church become void in the life of a Bishop, and so remain untill after his decease, the King shall present thereunto, and not the Executor or Administrator, for nothing can be taken for a presentment, and therefore it is no Assets, 9 H. 6. 58. 11 H. 4. 7.

Sect.

*Scit. 741. fol. 388. a.*

Here the collaterall warranty doth descend upon the issue in tail, before any right doth descend unto him, wherein this diversity is to be observed (*vide Scit. 707.*) where the right is in *esse*, in any of the Ancestors of the heir, at the time of the descent of the collaterall warranty, there albeit the warranty descend first, and after the right doth descend, the collaterall warranty shall bind, as appeareth in this case of our Author. But where the right is not in *esse* in the heir, or any of his Ancestors at the time of the fall of the warranty, there it shall not bind.

As if Lord and Tenant be, and the Tenant make a feoffment in fee with warranty and after the feoffee purchase ~~for~~ Seigniorie, and after the Tenant *cesse* the Lord shall have a *Cessavit*, for a warranty doth extend to rights precedent, and never to any right that commenceth after the warranty, 7 E.3. 48. 30 Hen.8. 42.

Also a warranty shall never barre any estate that is in possession, reversion or remainder that is not devested, displaced, or turned to a right before, or at the time of the fall of the warranty.

If a Lease for life be made to the Father, the remainder to his next heir, the Father is disseised and released with warranty and dyeth, this shall barre the heir although the warranty doth fall, and the remainder cometh in *esse* at one time, *lib. 1. fol. 67. Archers Case.*

If there be Father and Sonne, and the Sonne hath a rent service suit to a Mill, rent charge, rent seck, common of pasture, or other profit apprehended out of the Land of the Father, and the Father maketh a feoffment in fee with warranty and dyeth, this shall not barre the Sonne of the rent, common, &c. *quia in tali casu transit terra cum onere*, and he that is in seisin, or possession, need not to make any entry, or claim; and albeit the Sonne after the feoffment with warranty, and before the death of the Father had been disseised, and so being out of possession, the warranty descended upon him,

him, that it should not binde him, because at the time of Warranty made, the Son was in possession, *Temps E. 1. vouch. 296. 31 Aff. 13. 22 Aff. 36. 41 Aff. 6. (33 E. 3. 3. gar. 24.) .. 10. f. 97. E. Seymors Case.*

So if my collateral Ancestor releaseth to my Tenant for life, this shall not binde my reversion or remainder, because the reversion, &c. continued in mee, *45 E. 3. 31. 21 H. 7. 11.*

But if he that hath a Rent Common, or any profit out of the land in Tail, disseise the Tenant of the land, and maketh a feoffment to the land, and warranteth the land to the feoffee and his heirs, regularly the Warranty doth extend to all things issuing out of the land (*i.e.*) to warrant the land in such plight and manner as it was at in the hand of the feoffor at the time of the feoffment with Warranty, and the feoffee shall vouch, as of lands discharged of the rent, &c. at the time of the feoffment made. *Vide S. 698. 21 E. 4. 26. 28 H. 7. 9. 3 H. 7. 4. 7 H. 4. 17. 30 H. 8. Dyer 42. 30 E. 3. 30. 9 E. 3. 28. 45 E. 3. vouch. 72. F.N.B. 145. 14 H. 8. 6.*

A woman that hath a rent charge in fee, intermarries with the Tenant of the land, an estranger, releaseth to the Tenant of the land with Warranty, he shall not take advantage of this Warranty, either by Voucher or *warrantia Carta*, for the wife if the husband die, or the heire of the wife living, the husband cannot have an action for the rent upon a Title, before the Warranty made, for if the heire of the wife bring an Affize of *Mordant*, this action is grounded after the Warranty, whereunto the Warranty shall not extend.

So it is if the grantee of the rent grant it to the Tenant of the land upon condition, which maketh a feoffment of the land with Warranty, this Warranty cannot extend to the rent, albeit the feoffment was made of the land discharged of the rent, for if the condition be broken, and the grantor be intitled to an action, this must of necessity be grounded after the Warranty made.

But in the case aforesaid, when the woman grantee of the

rent marrieth with the Tenant, and the Tenant maketh a feoffment in fee with warranty, and dieth, in a *Cui in vita* brought by the wife (as by Law shee may) the feoffee shall vouch as of lands discharged at the time of the warranty made, for that her Title is Paramount.

So if Tenant in Tail of a rent charge purchase the land, and make a feoffment with warranty, if the issue bring a *Formedon* of the rent, the Tenant shall vouch *causa qua supra*. 7 H.4.17.

But some do hold, that a man shall not vouch, &c. as of land discharged of a rent service. 10 E.4.2.b. 28 E. 3.55. 44 E.3.29.

301 Also no warranty doth extend unto meer and naked Titles, as by force of a condition, with clause of Re-entry, Exchange, Mortmain, consent to the Ravisher, &c. because that for these an action doth lie, and if no action can be brought, there can be neither Voucher, Writ of *warrantia Cartae*, nor Rebutter, and they continue in such plight and essence, as they were by their originall creation, and by no act can be displaced or devested out of their originall essence, and therefore cannot by any warranty, l.10. fo. 97. 41 Ass.p.46.

And albeit a woman may have a Writ of Dower, &c. yet because her title of Dower cannot be devested out of the originall essence, a collaterall warranty of the Ancestor of the woman shall not barre her. So it is of a feoffment *causa matrim. pralocuti*, 34 E.3. Droit 72. 21 E.4.82.

433 A warranty doth not extend to any lease for years, or to any estates of Tenants by Statute Staple, Merchant or Elegerit, or any other Chattell, but onely to Freehold or Inheritance. And this is the reason, that in all actions which lessee for years may have, a warranty cannot be pleaded in barre, as in an action of Trespasse, or upon the Statute of 5 R.2, &c. 21 E.4. 18.82. 1 H.7.12.22. 11 H.7.19,16. 20 H.7.2.b. 14 H.7.22. 43 E.3.15. per Finchden in *Qu. imp.* 15 H.7.9.

But in such actions which none but a Tenant of the Freehold

hold can have, as upon the Statute of H. 6. Ass. Sec. there a warranty may be pleaded in barre.

Although a collaterall warranty be descended, yet if the estate whereunto the warranty was annexed be defeated, albeit it be by a meer stranger (as in this case that *Littleton* here put by the discontinuance) the warranty is defeated: and although the discontinuance remain, and no Remitter wrought to the heir, yet the warranty is defeated, and barre removed, so as the issue in Tail may have his *Formedon* and recover the land. *Sublato Principali tollitur Adjunctum*, 3 H. 7. 9. b. 16 E. 3. *Continual Claim* 10. 9 H. 4. 8. Pl. Com. 158.

Sett. 743. Fol. 390. d.

*Si tenant in tail fait un feoffment a son uncle, & puis l'uncle fait un feoffment in fee, ouesque gar. &c. a un autre &c.*

When the uncle taketh back as large an estate as he had made, the warranty is defeated, because he cannot warrant land to himself.

And so it is if the uncle had made the warranty to the feoffee, his heirs and assigns, and taken back an estate in fee, and after infeoffed another, yet the warranty is defeated, for that he cannot be assignee to himself, 40 E. 3. 14. 16 E. 3. *Vouch.* 87. 19 E. 3. *Vouch.* 122. 17 E. 3. 73, 74. 20 H. 6. 29.

A man shall not regularly vouch himself as assignee of a fee simple. And yet if the Father be infeoffed with warranty to him and his heirs, the Father infeoffeth his heir apparent in fee, and die, he shall vouch himself, and be heir in Borough English, by reason the act in Law determined the warranty between the Father and the Son, 41 E. 3. 25. a.

But if a man make a feoffment in fee with warranty to the feoffee, his heirs and assigns, and the feoffee reinfeoffe the feoffor and his wife, or the feoffor, and any other stranger, the warranty remaineth still, 11 H. 4. 20, 42. 17 E. 3. 47, 49. 18 E. 3. 56. 29 E. 3. 46. 39 E. 3. 9.

Sect. 744. *ib.*

A man infeofeth a woman with warranty, they intermarry, and are impleaded upon the default of the husband, the wife is received, she shall vouch her husband, &c. notwithstanding the warranty was put in suspence, 6 E. 2. *Vouch.* 257. 3 E. 3. *ib.* 201. 5 E. 3. 16. 178.

And so on the other side, if a woman infeofe a man with warranty, and they intermarry and are impleaded, the husband shall vouch himself and his wife by force of the said warranty, 4 E. 2. *Vouch.* 245, 246.

An Infant *en ventre sa mere* may be vouched if God give him a birth, and if not such a one heir to the warranty, but he cannot be vouched alone without the heir at the Common Law, for Proceſſe ſhall be preſently awarded againſt him, *Temps* E. 1. *gard.* 1. 2. 3 E. 1. *Breve* 873. 8 E. 2. *Vouch.* 237. 11 E. 3. *ib.* 13. 9 H. 6. 24. *Pl. Com.* *Stowels Caſe*, per *Saunders* and *Brown*.

Tenant in Tail maketh a feoffment in fee with warranty, and diſſeiſe the diſcontinuée, and dieth ſeiſed, leaving Aſſets to the iſſue; ſome hold that in reſpect of this ſuſpending warranty and Aſſets, the iſſue in Tail ſhall not be remitted, but that the diſcontinuée ſhall recover againſt the iſſue in Tail, and he take advantage of his warranty, if any he hath, and after in a *For-medon* brought by the iſſue, the diſcontinuée ſhall barre him in reſpect of the warranty and Aſſets, and ſo every mans Right ſaved, 21 E. 3. 36. *a. b.* 38 E. 3. 21. 44 E. 3. 26. 45 E. 3. *Title* 32. 44 E. 3. *ib.* 31. 33 E. 3. *ib.* 4.

## Sect. 745.

Note a diverſity; In the caſe of an Appeal, the Defendant ſhall forfeit no lands, but ſuch as he had at the time of the outlawry pronounced, for that there is no time alledged in the Writ, when the Felony was done: But in caſe of Indictment, ſuch as he had at the time of the Felony committed,



mitted, for there is a certain time alledged. And in the case of the Indictment there is also a diversity to be observed; for it shall relate to the time alledged in the Indictment, for avoiding of Estates, Charges, and Incumbrances, made by the Felon after the Felony committed, but for the mean Profits of the land, it shall relate onely to the Judgement, as well in this case of Outlawry, as in other cases, 33 E.3. Forfeitt. 30. 38 E.2. 31. 3 E.4. 25. 19 E.4. 2. Pl. Com. 488. b.

Felony, *Ex vi termini significat quodlibet capitale crimen felleo animo perpetratum.* Glan.

If a Felon be convicted by Verdict, Confession or Recreancy, he doth forfeit his goods and chattels, &c. presently. A man is said <sup>to be attainted, when</sup> convicted before he hath judgement. For Felony by Chance-medley, or *se defendendo*, or *petit larceny*, a man shall forfeit his goods and chattels, and no lands of any estate of Freehold or Inheritance. *Stanf. prerog.* 45. b. 16 E. 3. Cor. 116.

By the Law at this day under the word (Felony) in Commissions, &c. is included Petit Treason, Murther, Homicide, Burning of houses, Burglary, Robbery, Rape, &c. Chance-medley, *se defendendo*, and Petit larceny. *And in personallty old time high treason was included in the words*

*Sett.* 746, 747.

It is a generall rule, That having respect to all those whose blood was corrupted at the time of the Attainder, the Pardon doth not remove the corrupting of blood neither upward nor downward. *Braet. l. 3. fo. 13 2. &c. Brit. fo. 215 b.*

As if there be Grandfather, and Son, and the Grandfather, and Father have divers other Sons, if the Father be attainted of Felony, and pardoned, yet doth the blood remain corrupted, not onely above him and about him, but also to all his children, born at the time of this Attainder.

But in the case of *Littleton* if Tenant in Tail at the time of his Attaiuder had no issue, and after his pardon had issue, that issue should have been bound by the warranty.

And if his Father had issue before the pardon, and had is-

ſue alſo after and dieth, nothing can deſcend to the youngeſt, for that the eldeſt is living and diſabled. But if the eldeſt ſon had died in the life of the Father without iſſue, then the youngeſt ſhould inherit.

53 Nota, That a judgement againſt a man for felony, is that he be hanged by the neck untill he be dead, but *implicative*, he is puniſhed. 1. In his wife, That he ſhall loſe her dower. 2. In his children, they ſhall become baſe and ignoble. 3. He ſhall loſe his poſterity, for his blood is ſtained and corrupted, that they cannot inherit unto him, or any other Aunceſtre. 4. He ſhall forfeit all his lands, and tenements which he hath in fee, and which he hath in tail, for term of his life. And 5. all his goods and chattels.

The wife of a man attainted of high Treason, or pety Treason ſhall not be received to demand Dower, unleſſe it be in certain caſes ſpecially provided for. *Stan. Pl. Cor.* 195.

But the wife of a perſon attainted of miſpriſion of Treason, Murther, or Felony is dowerable ſince our Author wrote, by the Statute of 1 E. 6. cap. 13. 5 E. 6. cap. 11. 5 El. ca. 1. & 11. 18 El. cap. 1. 12 H. 4. 3. *Vide Sect.* 55.

So if a Seigniory be granted with warranty, and the Tenancy eſcheat, the Seigniory whereunto the warranty was annexed is extinct, and conſequently the warranty defeated, and it ſhall not extend to the land, & ſic in ſimilibus, 6 H. 4. 8. 45 E. 3. *vouch.* 72. *Pl. Com.* 292. 16 E. 3. *Age* 46. 28 H. 3. *vouch.* 281. 23 E. 3. *garr.* 77. *Vide Sect.* 200.

If a collaterall Aunceſtre release with warranty, and enter into Religion, now the warranty doth binde; but if after hee be deraigned, now it is defeated.

*Sect.* 748. *Fol.* 393.

*Per release de tous maners de garr. ou de tous covenants reall, ou de tous demandes, le garr. eſt extinct. Et mults autres caſes & maters y ſont per queux home poit defeate garr. &c.*

247 As by a defeſance, as other things executory may. Alſo a warranty may loſe his force, by taking benefit of the ſame, 43 E. 3. 17. *Pl. Com.* *Brownings caſe.*

In a Precipe the tenant voucheth, and at the *sequatur sub suo periculo*, the tenant and the vouchee make default, whereupon the demandant hath judgement against the tenant; and afterwards the demandant brings a *Scire facias* against the tenant to have execution. In this case the Tenant may have a *war. Carte*. And if in that case a stranger had brought a *precipe* against the Tenant, hee might have vouched again, for by the judgement given against the Tenant, the warranty lost not his force, but if the Tenant had judgement to recover in value against the vouchee, he should never vouch again by reason of that warranty, because he had taken advantage of the warranty; and it is to be observed that upon the proccesse of *Summon. ad warr.* if the Sheriffe return the vouchee summoned, and he make default, the Tenant shall have a *Capias ad val.* but if he return that the vouchee had nothing, then after the *Sicut alias & plures*, a *seq. sub suo periculo* shall issue; and there if the vouchee make default, the Tenant shall not have judgement to recover in value, for he was never summoned, and it appeareth of Record, that he hath nothing, but in the *Cap. ad Val.* it appeareth that he had Assets, and he had been summoned before: But in some speciall cases, there shall be two recoveries in value upon one warranty. As if a disseisor give lands to the husband and wife, and to the heirs of the husband: the husband alieneth in fee with warranty and dieth, the wife bringeth a *Cui in vita*, the Tenant vouch and recover in value, if after the death of the wife, the disseissee bring a *precipe* against the Alienee, he shall vouch, and recover in value again.

So it is where the wife bringing a Writ of Dower against the Alienee, he shall recover in value, and after her death, hee shall recover in value again upon the same warranty. 45 E. 3. *vouch. 72.*

In the same manner it is if a man be seised of a rent by a defeasible title, and release to the Tenant of the Land all his right in the Land, and warrant the Land to him and his heirs, if he be impleaded for the rent, he shall vouch and recover in value for the rent, and if after he be impleaded for the

Land, he shall vouch, &c. again for the Land: But in these and the like cases, the reason is in respect of the severall Estates recovered, but for one and the same estate he shall never recover but once in value, and though the Land recovered in value be evicted, yet he shall never take benefit of that warranty after, and as warranty may be defeated in the whole, so they may be defeated as to the party of the benefit, that may be taken of the same. As he that maketh a warranty may make a defeasance, not to take any benefit by way of voucher.

In the like manner that he shall take no advantage by way of *warrantia Carta*, or by way of Rebutter. 7 H.6.43. 13 Aff.8. 13 E.3.gar.24,25. 3.7. 22 H.6.51. 8 H.7.6.

## Sect. 749.

If Tenant in Tail alien with warranty and leave Assets, to descend, if the issue in Tail doth alien the Assets, and die, the issue of that issue shall recover the Land, because the lineall warranty descends onely to him without Assets, for neither the pleading of the warranty without Assets, nor Assets without warranty, is any barre in the Formedon in the descender.

But if the issue to whom the warranty and Assets descended had brought a Formedon, and by judgement had been barred by reason of the warranty and Assets; In that case albeit he alieneth the Assets, yet the estate Tail is barred for ever: for a barre in a Formedon in the descender, which is a Writ of the highest nature that an issue in Tail can have, is a good barre in any other Formedon in the descender brought afterwards upon the same gift. *Temps E.1. gar.89. 34 E.1. ib.88. 11 E.2. ib. 3. 4 E.3.24. 5 E.3.14. 40 E.3.9. 14 H.4.39.24 H.8.a. Br.33. 4. M.Dy.13. l.10 37,38. Mary Portingtons case.*

## Epilogus.

*Nulla virtus, nulla scientia locum suum & dignitatem conservare potest sine modestia. Ratio est anima legis.*

It by study and industry we make not the reason of the Law our own, it is not possible for us to retain it in our memories. And we must couple arguments and reasons together.

*Quia Argumenta ignota & obscura ad lucem rationis profertur, & reddunt splendida.* Sir Richard Hankford. 11 H. 4. 37.

*Homo ne scivera de quel mettai un campane est, si ne soit bien bate, ne le ley bien conus sans disputation.*

*Feo aye disputer cest matter pur la apprender la ley.* 41 E. 3. 22. Kirton. Vide Sect. 377.

*Lex plus laudatur quando ratione probatur.*

*Lex est sanctio sancta, jubens honesta, & prohibens contraria.*  
*Vide cest definitio, Lib. 1. fo. 131. Chadleighs Case.*

*Al unique Dieu gloire.*

FINIS.

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